(6)

PROCEEDINGS AND ORDERS

CASE NBR: [91101292] CFX STATUS: [DECIDED]
SHORT TITLE: [Haitian Refugee Center]
VERSUS [Baker, Sec. of State, et al.] DATE DOCKETED: [021092]

PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Feb 10 1992	D	Petition for writ of certiorari filed.
2	Feb 10 1992	G	Motion of petitioners Haitian Refugee Center, et al. for a temporary waiver of Rule 33 printing requirements filed.
3	Feb 10 1992	P	Motion of petitioners to expedite consideration of the petition filed.
4	Feb 10 1992	P	Application (A91-581) for a stay of mandates of the Court of Appeals for the Eleventh Circuit, submitted to Justice Kennedy.
5	Feb 11 1992		(A91-581) The application for stay of mandates of the United States Court of Appeals for the Eleventh Circuit presented toJustice Kennedy, has been referred to the Court by him. The motion of petitioners for temporary waiver of Rule 33 is granted. The Solicitor General is directed to file a response to the application for stay

PREVIOUS 1 1 EXIT

SHDKT PROCEEDINGS AND ORDERS DATE: [02/28/92]

CASE NBR: [91101292] CFX STATUS: [DECIDED]
SHORT TITLE: [Haitian Refugee Center]
VERSUS [Baker, Sec. of State, et al.] DATE DOCKETED: [021092]

PAGE: [02]

	DATE	NOTE	PROCEEDINGS & ORDERS
5	Feb 11 1992		(A91-581) The application for stay of mandates of the United States Court of Appeals for the Eleventh Circuit presented toJustice Kennedy, has been referred to the Court by him. The motion of petitioners for temporary waiver of Rule 33 is granted. The Solicitor General is directed to file a response to the application for stay and the petition for a writ of certiorari on or before 3 p.m. Friday, February 14, 1992. Justice Blackmun would grant the application for stay at this time.
7	Feb 11 1992		Motion of petitioners Haitian Refugee Center, et al. for a temporary waiver of Rule 33 printing requirements GRANTED.
10	Feb 13 1992		(A91-581) Supplemental Declaration of applicants filed by James A. Rogers.
6	Feb 14 1992		REDISTRIBUTED. February 21, 1992

2 pp

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SHDKT PROCEEDINGS AND ORDERS DATE: [02/28/92]

CASE NBR: [91101292] CFX STATUS: [DECIDED]
SHORT TITLE: [Haitian Refugee Center]
VERSUS [Baker, Sec. of State, et al.] DATE DOCKETED: [021092]

	DATE	NOTE	PROCEEDINGS & ORDERS
8	Feb 14 1992	X	Brief of respondents James Baker, III, Secretary of State, et al. in opposition filed.
9	Feb 14 1992		(A91-581) Response in opposition filed on behalf of respondents James Baker, III, et al.
12	Feb 14 1992		(A91-581) Application for stay of mandates presented to Justice Kennedy and by him referred to the Court.
11	Feb 15 1992		(A91-581) Reply to opposition filed.
13	Feb 24 1992		The application for stay of mandates presented to Justice Kennedy and by him referred to the Court is denied. The petition for a writ of certiorari is denied. Opinion by Justice Stevens respecting the denial of certiorari. Opinion by Justice Thomas respecting the denial of certiorari. Dissenting opinion by Justice Blackmun.

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91-1292

No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

Haitian Refugee Center, Inc., et al.
Petitioners,

vs.

James Baker, III, Secretary of State, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Liberties Foundation

QUESTIONS PRESENTED

1. May the Executive, consistent with the First Amendment to the United States Constitution, selectively deny to attorneys and advocacy groups -- while granting to the press, the clergy, lawyers not of record and others -- access to meet and consult with Haitian members of a certified class of litigants who are those attorneys' clients in pending litigation, solely because those attorneys and advocates seek to communicate regarding rights which the Executive claims the Haitians do not possess and where those messages explain and promote views with which the Executive expressly disagrees?

2. Do Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, INA § 243(h), and Executive Order 12324 (Sept. 29, 1981), permit the Executive to return to Haiti persons who face death or persecution upon their return where the procedures used to make those determinations are wholly arbitrary and inadequate?

3. Is judicial review under the Administrative Procedure Act precluded or committed to agency discretion where low-level agency officials use arbitrary and irregular procedures to determine whether Haitians should be returned to the country where they would face death or persecution?

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PARTIES TO THE PROCEEDINGS

The Petitioners are The Haitian Refugee Center, Inc., a Florida not-for-profit corporation, and Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Leger Pierre Frantz, Ochel Engerril, Jean Michael Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil, Condanser Joseph, on behalf of themselves and all others similarly situated.

The Respondents are James Baker, III, Secretary of State, Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard, Gene McNary, Commissioner, Immigration and Naturalization Service, The United States Department of Justice, Immigration and Naturalization Service, and the United States.

OPINIONS BELOW

On February 4, 1992, the United States Court of Appeals for the Eleventh Circuit, in a two to one decision on consolidated appeals from the United States District Court for the Southern District of Florida, entered a final order which is unreported. App. 56[1] (Feb. 4 appellate order). The court dismissed as moot Case No. 91-6099, vacated all injunctive orders in Case Nos. 91-6105 and 91-6118, and remanded the cases to the district court with instructions upon remand to dismiss the action because the complaint fails to state a claim upon which relief may be granted. The per curiam panel also issued the mandate forthwith. The decisions giving rise to these appeals were issued on December 18, 20, and 23, 1991 by the district court. None of these decisions are reported. App. 44 (Dec. 18 order), App. 46 (Dec. 20 order), App. 48 (Dec. 23 order).

The three decisions of the district court relied upon and supplemented the district court's initial Order of December 3, 1991, which made detailed findings of fact. App. 42 (Dec. 3 Mem. Op.). The December 3, 1991

[1] Petitioners had submitted on January 31, 1992 an Appendix (Vols. 1-4) in Docket No. A-551 when they were Respondents to the Government's application for a stay. To avoid duplication, we reference and incorporate these 4 volumes of Appendix as the Appendix on this Petition, together with Volumes 5 and 6 of the Appendix submitted with the Stay Application Petitioners filed herewith. All citations will be to the Appendix and will identify the sequential tab number (e.g., "App-___").

Order is not reported. On December 17, 1991 the same panel of the Eleventh Circuit also, in a two to one decision, dissolved the injunction issued December 3, 1991 and remanded the case to the district court, with instructions to dismiss on the merits, Petitioners' claim based on Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees. App. 43 (Dec. 17 appellate order). On January 28, 1992, a petition for *en banc* review of this order was denied. App. 51 (Jan. 28 appellate order). This decision is also not reported.

JURISDICTIONAL STATEMENT

This Petition seeks review of the judgment of the Eleventh Circuit Court of Appeals of December 17, 1991 denying Petitioners' claims based on Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, the decision of January 28, 1992 denying *en banc* review of that order, and the judgment of February 4, 1992 dismissing Petitioners' claims in all respects, including those based on the First Amendment, the Administrative Procedure Act, the Immigration and Nationality Act, and Executive Order 12324 (Sept. 29, 1981). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims are based on the First Amendment to the United States Constitution, Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, the Administrative Procedure Act, the Immigration and Nationality Act §§ 208 and 243(h), Executive Order 12324 (Sept. 29, 1981), the Agreement Effected By Exchange Of Notes For Migrant Interdiction Between Haiti and the United States, and Immigration and Naturalization Service ("INS") Guidelines for the Interdiction Program. All relevant sections that are not easily accessible have been included in Petitioners' Exhibit ("P.E. at 1-9").

STATEMENT OF FACTS

A. Background

On September 29, 1981, President Ronald Reagan issued Executive Order 12324 concerning the interdiction of aliens seeking to enter the

United States. The purpose of the Executive Order was both to interdict illegal aliens seeking to enter the United States and to ensure "that no person who is a refugee will be returned without his consent." Executive Order 12324, Section 2(c)(3). (P.E. at 2). To achieve both goals, the President directed that "the Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating [Department of Transportation] take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our *international obligations* concerning those who genuinely flee persecution in their homeland." Executive Order 12324, Section 3 (P.E. at 2) (emphasis added).

The Executive Order arose out of the Agreement Effected by Exchange of Notes Between the United States and the Republic of Haiti of September 23, 1981 (P.E. at 4-6). The Agreement made specific reference to the parties' "international obligations mandated in the Protocol Relating to the Status of Refugees" (P.E. at 4), and that the United States would not return to Haiti any persons who "qualify for refugee status." (P.E. at 6).

To comply with the Executive Order and Article 33 of the Protocol, the Immigration and Naturalization Service established Interdiction Guidelines and Operations Instructions. These Guidelines recognize INS' responsibility that the United States be "in compliance with its obligations regarding actions toward refugees" (P.E. at 7), and that one of the sources of authority for its Guidelines and Operations Instructions was Article 33 of the Protocol. (*Id.*)

To comply with the Guidelines, the INS agents aboard Coast Guard vessels are required to identify candidates for asylum as political refugees under U.S. and international law. Haitians identified as potential candidates for asylum are to be "screened in" -- transported to the United States for further proceedings. Those Haitians "screened out" are subject to forcible return to Haiti without further proceedings.[2]

[2] On November 18, the day before this suit was filed, the Respondents forcibly returned to Port-au-Prince 538 Haitians held on the Coast Guard Cutters "Dallas" and "Confidence." *See* App. 11 (Jennings Dep. at 7); App. 12 (Schneider Dep. at 5-6); App. 26 (Baker Dep. at 20). Tragically, the procedures afforded those Haitians were totally inadequate. *See* App. 26 (Baker Dep. at 16-18); App. 11 (Jennings Dep. at 13-16, 31-43, 45, 50, 67, 71-77); App. 12 (Schneider Dep. at 4-6, 11-13, 18-20, 22-24, 29-30). During the period INS officials screened these Haitians, the officials believed, among other things, that *no* Haitians would

This case concerns the wholly "arbitrary" procedures used by low-level INS officials in violation of the President's directives in the Executive Order where the record disclosed that Haitians fleeing their country had a "substantial threat of ... loss of liberty or death at the hands of Haiti's military on account of [their] political beliefs." App. 46 (Dec. 20 order at 7) and App. 42 (Dec. 3 Mem. Op at 55). At the same time, these government officials collectively barred Petitioner Haitian Refugee Center, Inc. ("HRC") and counsel representing the class of Petitioners in this case from meeting with and speaking with their clients, "to assist the Haitians in understanding and navigating through the predicament in which our government placed them." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 6).

The district court, in finding that "the largely liberty - and life - implicating threats of injury to plaintiffs outweighed the largely financial threat of harm to defendants," nevertheless entered a limited injunction which prevented the Respondents from returning Haitians to Haiti only until such time as they could "implement and follow procedures, such as the INS Guidelines, which are adequate to insure that class members are not forcibly returned to a country where, on account of their political opinion, their life and liberty are threatened ..." App. 42 (Dec. 3 Mem. Op. at 61). In so doing, the district court stressed that the relief provided "herein does *not* grant plaintiffs entry to this country, but merely prohibits their forced return to Haiti ..." App. 42 (Dec. 3 Mem. Op. at 62).

The district court's injunctive order concerning the First Amendment right to access was equally narrowly drawn. In finding that the Respondents had "opened the [Guantanamo] camps to members of the press and to representatives of the United Nations High Commission on Refugees," that "the portions of the military installation to which HRC seeks access are not used for military purposes [but] serve the non-military function of detaining refugees," and that HRC's right of access is magnified "because of the increased likelihood that interdictees returned to Haiti will face persecution or death," the district court enjoined the Respondents from forcibly returning Petitioners to Haiti only until HRC

actually be returned, and reviews and reinterviews of "doubtful" cases "screened out," on that mistaken assumption, were never done. *See* App. 4, Exhibit F (Beyer Dep. at 133). At least four of those returned Haitians are known to be in hiding, App. 3, Exhibit A (McCalla Aff. at ¶ 40), and forty-two (42) persons have now fled a second time. *See* Declaration of James A. Rogers of Feb. 9, 1992, Exhibit A, submitted with Petitioners' Application for Stay and this Petition.

had an opportunity to exercise its First Amendment right of access to class members. Despite the government's contrary suggestion, the district court did *not* direct Respondents to *assist* HRC in exercising their rights or require Respondents to take any *affirmative* action, but simply prohibited content based denial of access and left to the government the determination as to "reasonable, content-neutral, time, place and manner restrictions." App. 46 (Dec. 20 order at 9-10). Respondents refused to set any conditions and have enforced a total ban on access.

B. The Relative Harm To The Parties

In entering its injunctions in this case, the district court weighed the relative harms to the parties. While finding the Respondents' harm to be monetary and otherwise largely "speculative," the district court repeatedly found that if Petitioners were returned to Haiti they would face a substantial likelihood of persecution or death at the hands of the Haitian military. App. 42 (Dec. 3 Mem. Op at 5) and App. 46 (Dec. 20 order at 9). These findings were well supported in the record and never challenged.

On September 30, 1991, President Aristide, the leader of Haiti's first democratically elected government in over 200 years, was overthrown by a military coup that the U.S. and the Organization of American States ("OAS") have condemned. To escape the junta's repression, increasing numbers of Haitians have fled the country by sea, many only to be interdicted by the U.S. Coast Guard, accompanied by Immigration and Naturalization Service ("INS") agents, enforcing U.S. immigration laws extraterritorially on the high seas.[3]

[3] Petitioners refer this Court to the district court opinion which succinctly describes the Alien Migration Interdiction Program ("AMIO") and the prior procedural history of this case. *See* App. 42 (Dec. 3 Mem. Op. at 2-10). Many of the Haitians interdicted since the September 30 coup were not headed to the United States in the first place. *See* App. 2, Exhibit A (Jolicoeur Aff. at ¶ 6) [originally headed for the Bahamas]; App. 15 (Alexis Dep. at 7) [fled Haiti without any particular destination in mind]; App. 12 (Schneider Dep. at 18) [came across people heading to Cuba who were interdicted and detained]; App. 26 (Baker Dep. at 57-58) [interviewed people not going to the U.S. who were detained in Guantanamo]. Respondents have advanced no explanation as to their authority or justification for interfering with *those* Haitians attempting to escape political persecution in Haiti, let alone to forcibly return them to Haiti. Surely the Respondents have no legitimate interest in enforcing U.S. immigration laws against

Only the district court orders protected the Haitian Petitioners from the risk of "loss of liberty or death at the hands of Haiti's military on the account of [their] political beliefs." App. 42 (Dec. 3 Mem. Op. at 55). The deadly seriousness of that "danger" is apparent from the testimony of the individual Haitian Petitioners, all of whom "despite having substantial political asylum claims were 'screened out,'" and thus marked for Coast Guard forcible return to Haiti. *Id.* at 55-57.

For example, Petitioner Golbert Miracle, a member and organizer for the Lavalas and the FNCD (both pro-Aristide groups) testified that he fled Haiti to escape the military after his mother had been killed and his aunt and one of his sisters arrested:

> Q. You said your mother was killed. How was she killed?
>
> A. When the military man came, no one would open the door. He forced himself in. They broke down the gates and they went in. ... My brother, younger brother, and my sister, they found out where I was and once they found out where I was, they are the ones to tell me that my mother was killed, was shot, that my aunt was arrested and one of my sisters was also arrested.

App. 20 (Miracle Dep. at 5-7). Petitioner Emanuel Saintil, a founding member of a pro-Aristide youth group, Movement of the Young of Cite Soleil, saw his father shot dead in front of a church because of his political affiliations:

> A. . . . My father went out to get some food to put on the table. As he was coming home, there were some soldiers in the neighborhood who know me as a militant for MGSS. Because they live in the neighborhood, they pointed the finger at my father to other soldiers, and they had my father killed. They shot my father in front of the Church of the Emaculate Conception in Cite Soleil.
>
> Q. You say you went out to look at your father's body. Did you see your father's body? Yes or no.
>
> A. Yes, I had time to see the body.

App. 23 (Saintil Dep. at 16-20).[4]

people seeking refuge in other foreign countries.

[4] INS similarly screened out other Petitioners. Petitioner Condanser Joseph, a founding member of a group which performed political theater in support of the FNCD, testified that soldiers looking for him shot up his house, killing his

The danger that these Haitian Petitioners face is documented by lengthy and detailed accounts by human rights groups describing the current reign of terror in Haiti.[5] A consortium of human rights groups in Haiti reported to the United States Congress that:

> The repression recorded since the beginning of the military coup has accelerated during the past few weeks, especially since the arrival of [an OAS] mission ... Summary executions, arbitrary arrests and desertions, torture, searches without warrants and under violent conditions, sacking of private and public properties, infringements of all freedoms of movement, speech, meeting and association ... The list of human rights violations lengthens every day and even increases with the clear intention of setting a reign of terror.

App. 2, Exhibit D at 2.

The Lawyers Committee for Human Rights reports, among other atrocities, that:

- On Thursday, November 14, journalists discovered the bodies of seven young men who had been executed. Their wrists were tied with electrical cords and their bodies had numerous bullet wounds. The bodies had been dumped alongside a road near a burial ground used by the Duvaliers to bury their victims.
- Casimir Rosalvo was arrested during a military raid in a poor neighborhood in Goaives on November 11. Soldiers then tortured him, particularly his genitals, ears and eyes.

App. 2, Exhibit D at 7-8.

younger brother. App. 17 (Condanser Dep. at 9-10). *See also* App. 21 (Pierre Dep. at 7, 11, 22) [member of FNCD, the political coalition supporting Aristide, fled after the military showered his home with bullets, killing his father]; App. 22 (Providence Dep. at 8, 17) [a long-time Aristide supporter who fled after the military shot up his house looking for him]; App. 19 (Jean Dep. at 7-9) [member of Komite Ti Legliz (the Aristide Church Organization) fled after police shot up his house and arrested his father, a known Aristide supporter]; App. 18 (Frantz Dep. at 8-9, 12-13) [member and candidate of Lavalas, a pro-Aristide movement, fled after he escaped military arrest]; and App. 14 (Charles Dep. at 5-7) [an organizer of a party supporting Aristide fled after the military came to his house to arrest him].

[5] The INS relies on just such reports for information about "country conditions," which is crucial to the screening process. App. 27 (Beyer Dep. at 45-46) [Chief Asylum Officer testified that he relies on independent reports from Lawyers Committee on Human Rights and the National Coalition of Haitian Refugees].

Our government repeatedly condemned the terror and persecution rampant in Haiti since the coup:

- President Bush ordered an embargo of Haiti citing the "grave events in [Haiti] that are ... disrupt[ing] the legitimate exercise of power by the democratically elected government. ...," App. 1, Exhibit E (Oct. 28, 1991 Exec. Order), and Respondent Baker vowed before an emergency OAS meeting to make the outlaw regime "a pariah in the western hemisphere." App. 79 (N.Y. Times, Oct. 4, 1991, at A8 col. 1);
- The U.S. delegate to the UN declared to the General Assembly that the U.S. "does not and will not recognize the self-appointed junta which has illegally usurped power in Haiti." App. 80 (N.Y. Times, Oct. 12, 1991, Sec. 1, 32 col. 2).

In its opinion of Dec. 20, 1991 the district court made supplemental findings that there were "worsening political conditions in Haiti since issuance of the [Dec. 3, 1991] opinion ..." App. 46 (Dec. 20 order at 5). Indeed, Respondents do not deny "the brutality or illegitimacy of the current regime in Haiti." *See* App. 34 (Plaintiffs-Appellees' Memorandum at 8). Instead, in a transparent attempt to divert the Court's attention from the lives at stake on this Petition for Review, Respondents would have this Court believe that the political conditions within Haiti have nothing to do with this case. *Id.* This is simply not so.[6]

In contrast to this obvious irreparable harm to Petitioners, the district court found that the Respondents' harm was monetary, and its other claims were "largely speculative." App. 42 (Dec. 3 Mem. Op. at 61).[7]

[6] The current conditions within Haiti are directly relevant for two reasons. First, the district court's holding that "the individual [Haitian] plaintiffs have shown a substantial threat that the absence of injunctive relief will cause the *most* irreparable type of injuries," was based directly on the Haitian Petitioners' testimony describing the political conditions in Haiti. App. 42 (Dec. 3 Mem. Op. at 59) (emphasis added). Second, as the Respondents' own witnesses admit, "country conditions" are crucial to an adequate determination of a political asylum claim. *See, e.g.*, App. 3, Exhibit K (Beyer Dep. at 104); App. 11 (Jennings Dep. at 74); App. 13 (Tilbury Dep. at 9).

[7] The district court's findings have never been challenged as clearly erroneous by the Respondents. Nor did the court of appeals suggest these findings were in error, as the panel majority failed to address any facts in its opinion relating to irreparable harm or the balance of harms. The Respondents sought an end run around this factual record by submitting affidavits in connection with their motions

C. The Government's Screening Procedures Are Inadequate To Protect Haitian Appellees From Unlawful Repatriation

In light of the irreparable harm evidenced in the record, the district court reviewed the procedures that were used to make determinations with regard to screening Haitians fleeing Haiti. In practice, the screening was deficient in every respect. INS officers, with no training or knowledge about Haitian politics or culture, screened Petitioners.[8] They were supervised by equally ignorant INS officials who, in any event, almost never reviewed determinations made by subordinates.[9] In fact, officers

for a stay in the circuit court and in this Court. Those affidavits, however, when tested do not support any assertion that any person or institution will suffer irreparable harm or sufficient injury to outweigh the irreparable harm to Petitioners. *See* Petitioners' Application to Recall and Stay the Mandate of the United States Court of Appeals for the Eleventh Circuit Pending Certiorari and for Expedited Treatment of the Appeal.

[8] Leon Jennings, Chief of the Asylum Prescreening Unit based in Miami, who was detailed to Guantanamo on November 16, 1991 to oversee the interview process, John Baker, his assistant, as well as asylum officers directly doing interviews of Haitians on Guantanamo, knew almost nothing about current conditions in Haiti. App. 11 (Jennings Dep. at 74-77), App. 26 (Baker Dep. at 30-31), App. 12 (Schneider Dep. at 36-37), App. 13 (Tilbury Dep. at 10). These officers, while interviewing Haitians fleeing persecution, could not name or recognize the following: the President and Prime Minister of the de facto regime; the general (Cedras) at the head of the military coup; the popular name for President Aristide; Ti Ligliz (church movement of President Aristide); La Fami Salivi (the orphanage established by President Aristide); and many others. Jennings, in fact, did not know that the Haitian Red Cross was not a member of the International Red Cross -- significant because Respondents turned repatriated Haitians over to the Haitian Red Cross. App. 11 (Jennings Dep. at 74-77).

[9] Jennings never reviewed any of Asylum Officer Schneider's interviews, notwithstanding the fact that Schneider interviewed scores of Haitian refugees before he had any information about the political conditions in Haiti, App. 12 (Schneider Dep. at 8-9), that Schneider had received no training concerning Haitian culture or the nuances in interviewing Haitians before he arrived (*Id.* at 22), that he received no instructions about the interview forms used *(Id.* at 6), and that he was not able to identify the names of widely known Haitian political figures and organizations after almost two weeks of conducting hundreds of interviews (*Id.* at 36-37).

interviewed applicants without knowing the proper standard to apply, App. 13 (Tilbury Dep. at 6-7), or without receiving any information concerning the political conditions in Haiti until days after interviews were completed and persons forcibly returned.[10] Recordkeeping was also in complete chaos. Respondents did not even bother to keep track of who had been "screened-in" and who had been "screened-out." Overworked and inexperienced INS interviewers on the cutters disposed of individual claims in just a few minutes.[11]

These conditions prompted Gregg Beyer, Chief Asylum Officer who was responsible for screening decisions made before November 16, 1991, to conclude on November 12, 1991 that the interview process should be suspended. *See* App. 3, Exhibit K (Beyer Dep. at 74-90). He found the interviews were "increasingly inconclusive" and "also of rapidly decreasing validity." A superior to Beyer returned the memorandum to him, did not discuss it, and, through a subordinate, instructed Beyer to "file it." Promptly thereafter, Beyer's supervisor relieved him of his pre-screening responsibilities. *Id.* at 74-90.

These procedural deficiencies were accompanied by clear instances of

[10] Asylum Officers Baker and Schneider went aboard the Coast Guard cutter Dallas and began conducting interviews almost immediately upon arriving at Guantanamo on November 17. App. 26 (Baker Dep. at 19); App. 12 (Schneider Dep. at 5-6, 8). Neither of them, however, was provided with any information about political conditions in Haiti until, at the earliest, November 21 -- and then the information was "mostly newspaper articles." App. 26 (Baker Dep. at 24-28); App. 12 (Schneider Dep. at 8-9). Thus, among the Haitians forcibly returned to Haiti on November 18 were Haitians whose *only* screening procedure was conducted by officials with *no* information about the political conditions in Haiti, and no experience interviewing Haitians.

[11] As Judge Atkins noted, the Respondents attempt to "minimize" the certain harm to these Haitians by pointing to "follow-up procedures" to monitor the safety of repatriated Haitians. App. 42 (Dec. 3 Mem. Op. at 58). However, as the INS Chief Asylum Officer testified, formal follow-up visits for those returned pursuant to the Interdiction Program ceased in 1985. App. 3, Exhibit K (Beyer Dep. at 56-58). The Respondents' misguided attempt to convince the district court that the Haitian Red Cross provides essential monitoring and safety functions also fails. As Judge Atkins found, the Haitian Red Cross is a not a member of the International Red Cross, and is not "independent of government interference and pressure." App. 42 (Dec. 3 Mem. Op. at 59). *See also* App. 3, Exhibit A (McCalla Decl. at 12).

refusal to provide a meaningful interview to Haitians with extremely strong claims for political asylum. Golbert Miracle, for example, whose mother was killed and aunts were arrested and disappeared, was given a four question, *three minute* interview where the interpreter -- *not* the asylum officer -- asked the questions. This "interview" was clearly not designed to elicit pertinent information:

> Q. What were the first things that the interpreter said up to then?
>
> A. He started to say, "Everybody comes here and talks about one thing, politics, politics. *Whatever you do, you are going to be sent back. Whatever you do.*"

App. 20 (Miracle Dep. at 15-17).[12]

The testimony revealed that the pre-screening procedures were, either purposefully or through indifference, a complete and utter sham -- a "formal" validation of a predetermined result. The district court found that "all [of] the individual plaintiffs described below were interdicted at sea *and, despite having substantial political asylum claims, were 'screened out,' i.e.*, marked for forcible return to Haiti." App. 42 (Dec. 3 Mem. Op. at 56-57).

[12] Raymond Edme, for example, was never asked what AJN, an organization he belongs to that supports Aristide, is or what work it does. App. 16 (Edme Dep. at 8). Roland Providence, for example, was rushed through his interview:

> Q. Did she ask you why you left Haiti?
>
> A. No. . . . I told her that I worked for Caritas, and that that I was a motivator for the Ti Legliz, that's all, because they were rushing us. They didn't ask us any other questions, and I didn't have time to express my point of view and my problems.

App. 22 (Providence Dep. at 18-19).

Further, many Haitians were given "unsympathetic" interviews. Enold Edmond told of the harsh and "unsympathetic" attitude and that he "did not translate to the officer all that the Haitian was telling him." App. 8 (Edmond Aff. ¶ 3). *See also* App. 9 (Ylnaud Aff. at ¶ 13) ["the interviewer sometimes doesn't ask too many questions or the way they ask it does not get all these details"]; App. 6 (Joseph Aff. at ¶ 3) ["It is possible that some of the 244 persons sent back to Haiti, as Edward was, were afraid to tell this Haitian woman (interviewer) their story because they, like I, did not know who she worked for"]; App. 7 (Hora Aff. at ¶ 13) ["Everyone's interviews lasted about five minutes or less"].

D. The Government Has Maintained A Total Ban On Access By HRC And Class Counsel

While low-level INS officials engage in arbitrary proceedings concerning Petitioners' asylum claims, the position of the Respondents has been to ensure that "while the interdictees are detained on the Coast Guard cutters and the Guantanamo Naval Base, they are denied information concerning their rights, the availability of counsel, and assistance in making their asylum claims." App. 42 (Dec. 3 Mem. Op. at 44-45).[13]

The Respondents have denied the Haitian Refugee Center[14] and class counsel access to Haitians kept at the part of the Guantanamo facility used as a refugee camp. While "the government has opened the camps to members of the press and to representatives of the United Nations High Commission on Refugees," App. 46 (Dec. 20 order at 9), and allowed in ministers, App. 68 (Wenski aff. at ¶ 2), and even other lawyers, App. 51, Exhibit A (Punancy aff. at ¶ 2), they maintain an absolute bar against class counsel and HRC speaking with the Petitioners. In short, the Respondents

[13] At the present time, Petitioners interdicted by Respondents are kept at a part of the Guantanamo Naval Base that serves "the nonmilitary function of detaining refugees." App. 46 (Dec. 20 order at 9). The lease between the United States and the Republic of Cuba concerning the land for the Guantanamo Naval Base provides that "during the period of occupation by the United States said areas under the terms of this agreement, the United States shall exercise complete jurisdiction and control over and within said areas ..." App. 30.

[14] The Haitian Refugee Center is a nonprofit membership corporation whose purpose is "to promote the well being of Haitian refugees through appropriate programs and activities, including legal representation of Haitian refugees, education regarding legal and civil rights, orientation, acculturation and social and referral services." App. 62 (Second Amended Complaint at ¶ 7). In this capacity, "it has brought substantial lawsuits challenging procedures and practices of the INS in processing Haitian refugee applications and has been recognized by the INS as a source of legal counsel for indigent Haitians." *Id.* The Respondents have totally banned HRC from speaking with or having any access to Haitian refugees at the Guantanamo Naval Base. As a result, the district court found that there was "a substantial likelihood that denying HRC the opportunity to meet, speak with and solicit its members results in personal and concrete harm to HRC." App. 42 (Dec. 3 Mem. Op. at 13).

"ha[ve] allowed access to the refugees to many individuals and groups. But it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 6).

In addressing this issue, the district court attempted to fashion a narrow remedy which would allow HRC and class counsel access to Haitians on Guantanamo and not establish a complete ban on repatriation. The district court mandated *no* affirmative expenditure or other government action, but simply ordered Respondents "to grant plaintiffs' counsel meaningful access, before repatriation, to the interdicted class members, leaving the Respondents free to establish reasonable time, place and manner restrictions and to repatriate Haitians after Petitioners' counsel had a meaningful opportunity of access to the class members. App. 46 (Dec. 20 order at 10). The district court concluded that the additional evidence regarding the conditions in Haiti "magnifies the importance of HRC's right of access because of the increased likelihood that interdictees returned to Haiti will face persecution or death." App. 46 (Dec. 20 order at 9).

In its first order, the panel majority of the court of appeals did not reject HRC's First Amendment right of access to Haitians on Guantanamo, but said simply that the court's injunction failed "to redress the right asserted by HRC" because "the District Court does not require defendants to allow HRC access to the Haitian interdictees ..." App. 43 (Dec. 17 appellate order at 4).

In its Order of February 4, 1992, however, the panel majority determined that HRC did not possess a right of access to the interdicted Haitians, and even if they had a right to associate with the Haitians, "this right of association would not give rise to the right of access that HRC claims." App. 56 (Feb. 4 appellate order at 34).

Judge Hatchett in dissent, however, noted that the panel majority's conclusions were reached by ignoring existing binding *en banc* precedent, by alleging facts "unsupported by the record before the court," and by flouting "a recognized canon of the legal profession [that] [l]awyers must have access to their clients so they may advise them of potential rights and causes of action in American courts." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 5, 8-9).

Finding also that "the record reveals that the government has indeed discriminated against HRC based on the content of its speech," and that "it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them," Judge Hatchett would have ordered the

Respondents to grant such access subject to reasonable time, place and manner restrictions.[15]

ARGUMENT

I. THIS CASE RAISES ISSUES OF GREAT NATIONAL IMPORTANCE WARRANTING THE GRANT OF CERTIORARI

This case concerns the liberty and fate of thousands of persons fleeing oppression and the interpretation of our solemn treaty commitments and rights under domestic law pertaining to the treatment of persons fleeing persecution. It also raises grave concerns relating to the administration of our immigration laws and the authority of low-level administrative officials to frustrate our nation's solemn treaty and domestic law obligations.

Notwithstanding the deeply rooted Constitutional tradition that ours is a government limited by law, the panel majority below ruled that when the government has interdicted refugees fleeing persecution, prevented them from reaching our borders and thus invoking our laws, it may act in a wholly arbitrary manner, even when life and liberty are threatened, without any judicial scrutiny whatsoever.

The panel majority of the court of appeals has held that this action is totally insulated from judicial review. This ruling raises grave concerns relating to the administration of justice and the integrity of the judicial process.

Most fundamentally, the Court should also grant review of the significant national question of whether our government may hold individuals incommunicado and totally bar access to them by their own attorneys, thereby frustrating their ability to represent them in proceedings in federal court, thus interfering with the integrity of the judicial process. The panel majority's opinion below does nothing less than bless unfettered content-based executive regulation of speech. It also permits an unprecedented total ban on access of any kind by attorneys to clients they

[15] The intentional discrimination by the Respondents against class counsel was subsequently demonstrated in the deposition of John W. Cummings, Acting Assistant Commissioner for Refugees, Asylum and Parole. Mr. Cummings candidly admitted that the INS did not want lawyers on Guantanamo because they would advise the Haitians "as to the process" and, thus, infect it. He thought that "it is unnecessary" for a lawyer to advise a Haitian who is being prescreened as to what the procedure is in his interview. App. 71 (Cummings Dep. at 76, 88).

already represent by stashing them in places they claim are immune from any access. This total ban raises the gravest of First Amendment concerns here because those attorneys are employed by a United States political association seeking to effectuate its organizational purposes by communicating with the organization's members -- individuals whose interests it seeks to serve in an effort to assert their legal rights in the courts and in existing administrative proceedings in which they are involuntarily involved -- and to focus public attention on governmental conduct of a particularly controversial nature.

In sum, low-level executive officials have denied the Haitian refugees substantive and procedural rights that are mandated by treaty, statute, executive order and administrative directive. Contrary to the First Amendment, the Executive has selectively denied the Haitians' counsel access to them to discuss and assert those rights. The panel majority has dismissed the refugees' claims and declared the Executive's action unreviewable, violating "well-established principles of American law" and controlling case law, App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 2), ignoring and distorting the record (*Id.*) at 4, 5, 8-9), and making appellate findings of fact unsupported by record evidence (*Id.* at 8-9). The Executive would now have this Court close the circle by denying review. This Court should grant review to reassert the rule of law with regard to these important national issues.

A. This Case Raises Grave Problems Concerning The Exercise Of First Amendment Rights

This case raises profound questions as to the right of the Executive Branch to exclude selectively persons and organizations based on the political or legal content of their message, when the Executive Branch is an interested party. Although the First Amendment bans any law abridging free speech, the court below permitted a total ban on such speech by a political association seeking to exercise its First Amendment rights to have its attorneys associate with and communicate to individuals held in custody by the government. The panel majority's decision leaves in place the Respondents' heretofore successful efforts to selectively prevent HRC and class counsel - and them alone - from visiting and meeting with counsel's clients. While Respondents have allowed the press, ministers, other organizations, and even other lawyers to speak with class counsel's clients and members, they have intentionally precluded HRC and class counsel from any form of communication with their clients and members.

The Respondents not only thwart Petitioners' efforts to come to the

United States where they would have counsel, they subject them to a sham process regarding their asylum claim, incarcerate them in refugee camps, and as their gatekeepers, selectively exclude not *all* who seek entry as advocates, but only those who have a particular legal and political message to impart.

Contrary to the majority below's attempt to mischaracterize this case as involving regulation on the time, place and manner of the exercise of First Amendment rights, what is upheld is nothing less than a total ban on access. The district court's limited injunction granted merely some right of access, "subject to reasonable, content-neutral, time, place and manner restrictions." App. 40 (Dec. 20 order at 11). Frustration of the Haitian Refugee Center's political and associational rights by the panel majority undermines the core values of the First Amendment in promoting public discussion of governmental affairs and exposing governmental conduct to public scrutiny through full expression. *See* Blasi, *"The Checking Value" of the First Amendment*, 1977 Am.B.Found.Res.J. 521 (1977). The panel's actions also:

> Flouts a recognized canon of the legal profession. Lawyers must have access to their clients so they may advise them of potential rights and causes of action in American courts. Even if the clients have no such rights or causes of action, the lawyer is entitled to counsel the client regarding the legal situation and the available options. Instead, in this case, the majority holds that the Haitian refugees have no rights enforcible in American courts and therefore they have no business meeting with lawyers. Thus, the majority deprives these non-English speaking Haitians, unschooled in the American legal system, of lawyers in a situation affecting their most fundamental interest, because of a prior determination that they have no rights that justify meeting with American lawyers. Obviously, such a determination of the Haitians' rights should be made only after they have received the benefit of counsel.

App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 9).

Under the panel majority's holding, lawyers representing multinational corporations abroad could be banned from doing so, a non-United States citizen charged with a crime on a military base abroad could be held incommunicado and prevented from seeing a lawyer, and a foreign leader kidnapped and detained by U.S. authorities abroad could be cut off from counsel seeking to challenge those actions. On the facts of this case, deprivation of a lawyer was designed precisely to prevent persons from

knowing or effectuating their legal rights.

B. This Case Presents A Substantial Question Regarding Our Country's Treatment Of Persons Fleeing Oppression

In statute (8 U.S.C. § 1253(h)), Senate ratified treaty (Article 33 to the U.N. Protocol), and presidential decree (Executive Order 12324), the Executive is charged with carrying out U.S. immigration law which incorporates an absolute and mandatory prohibition against the return of political refugees to a country where they face persecution or death because of their political views. Substantive legal rights -- such as the mandate that *no* political refugee be returned without his consent -- are enforceable through the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, even where the source of the substantive right itself may not directly provide an enforcement mechanism. Indeed, it is the purpose of the APA to provide remedial redress of substantive rights in exactly such cases. In this case, the district court found that Respondents would face "loss of liberty or death at the hands of Haiti's military ..." App. 42 (Dec. 3 Mem. Op. at 55).

Notwithstanding these findings, the panel majority's conclusion was that such persons fleeing oppression have no legal rights whatsoever and have no protection under domestic law or our solemn commitments under Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees ("Article 33"). This Court, just this term on two separate occasions, recognized our country's mandatory "obligation" under Article 33. *See United States v. Ray*, ___ U.S. ___, 112 S.Ct. 541, 543 n.1 (1991); *INS v. Doherty*, ___ U.S. ___, 60 U.S.L.W. 4085, 4090 (U.S. Jan. 15, 1992) (Scalia, J., concurring in part & dissenting in part, joined by Stevens and Souter, JJ.).

The panel majority, similarly, found that Executive Order 12324, INA §§ 208 and 243(h), and the Administrative Procedure Act provide no enforcible rights to curb any arbitrary or abusive actions by our government toward people fleeing oppression. Under the panel majority's holding, low-level government officials, in open disregard of the President's express directives under the Executive Order to protect refugees and Article 33's command not to return persons to a country where their life or freedom would be threatened, could use any arbitrary means to make those determinations without judicial review, sanction or inquiry. The panel majority's ruling leaves low-level INS officials free to flip a coin or spin the cylinder in a revolver to determine whether our country will protect refugees from oppression. The rejection of the rule of law, and the

unfettered discretion to engage in any type of conduct, raise profound issues warranting certiorari review.

C. This Case Raises A Substantial Question Concerning The Administration Of Justice

The actions of the lower court raise such serious concerns as to the administration of justice that this Court should grant certiorari in its supervisory capacity to correct the actions of the lower court. In rendering its various opinions in this case, the panel majority has gone beyond the role of a tribunal committing inadvertent mistakes or finding law when there is none. It has created facts that are not in the record. App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 2-3). It has engaged in fact finding on matters not borne out by the record. *Id.* at 9. It has *sub silentio* disregarded binding *en banc* precedent. *Id.* at 5. It engaged in conduct, in first issuing a stay, then withdrawing it as clerical error and then withdrawing the withdrawal as clerical error, that casts serious doubt on the propriety of the conduct.

Moreover, the Executive insisted with petulance that the court expedite appeals in these cases to the point where full opinions were not written, nor issues addressed, and neither the district court, the per curiam majority, nor the dissents completed the task of a deliberative opinion process. *See* opinions and dissents of December 17, 1991 and February 4, 1992.[16] In fact, the panel majority was so result oriented that it failed "to follow at least two well established principles of American law." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 2). It rushed to the ultimate merits of the case rather than limiting review to the appropriateness of the district court's entry of a preliminary injunction, thereby disregarding circuit precedent. Secondly, "the majority determine[d] the issues on appeal as though they are purely matters of law, without considering the District Court's findings of fact." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 3).

This case also involves the use by the Respondents of fraudulent declarations which, after disclosure, continued to be used in the court of

[16] In short, there was a speculative claim of harm and emergency that rivaled the alleged emergencies of *Korematsu v. United States*, 323 U.S. 214 (1944), the *Steel Seizure Cases [Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)], and the *Pentagon Papers Case [New York Times v. United States*, 403 U.S. 713 (1971)], all combined into one.

appeals, and even in this Court when the Respondents sought an emergency stay.[17]

Similarly, the Respondents provided affidavits to this Court and to the lower court which were not part of the record in the case, and relied on "facts" discussed in those affidavits as if they were part of the record. These affidavits were not only used in an improper fashion as if they were part of the record, but were in most instances simply disingenuous.[18]

[17] In their submissions to the district court, court of appeals and to this Court in their Emergency Stay Pending Appeal, the Respondents relied upon the declaration of Robert K. Wolthuis. Mr. Wolthuis' affidavit, however, was a sham. He was presented as acting in the capacity as the Assistant Secretary of Defense in his declaration, when his deposition revealed that he had assumed that position for one day and one day only -- the day he signed the declaration. App. 78 (Wolthuis Dep. at 5-6). Mr. Wolthuis admitted that he had never served in that capacity before, and he resigned it after the signing and has not acted in that capacity since. App. 78 (Wolthuis Dep. at 6). Moreover, although he stated in his declaration that he "has been closely and regularly involved in the formulation and implementation of U.S. policy concerning the Republic of Haiti," he stated in his deposition that he had only a vague understanding as to what the policy was, was not involved in formulating the policy, was aware of no written or other formal memorialization of any such policy, and was only involved in the matters to which he swore for part of one day. App. 78 (Wolthuis Dep. at 10-13). Wolthuis, in fact, simply signed a declaration which was handed to him and prepared for him by Respondents' lawyers, readily admitting that the sole basis for most of the facts that he swore to in his declaration were what the lawyers who had drafted it told him. App. 78 (Wolthuis Dep. at 31-34). The declaration was so defective and based upon fraudulent assumptions that Petitioners filed a separate memorandum concerning the declaration. When this case is finally reviewed, Petitioners believe this matter requires special scrutiny. Presently, his assertions should be noted as part of the course of conduct of the proceedings below. *See* App. 61 (HRC's Memorandum Concerning the Declaration of Robert K. Wolthuis).

[18] The Respondents relied, for example, on the affidavit of Admiral Leahy, which asserted that allowing a representative from the Haitian Refugee Center on Coast Guard cutters "would seriously interfere with the performance of [its] missions, and also create substantial threats to the safety of all involved," App. 73 (Leahy Decl. of Jan. 29, 1992), a statement repeated by the lower court in its discussion of the First Amendment. App. 56 (Feb. 4 appellate order at 36). Mr. Leahy, in his deposition, however, acknowledged that family members of Coast Guard members periodically go on Coast Guard cutters, and that his 14 year old son was on a Coast Guard cutter on a law enforcement mission while maintaining defense

This case also raises grave concerns about the administration of justice because lawyers representing a class of plaintiffs have been completely barred from speaking with and meeting with their clients, and therefore obtaining facts necessary to represent them in the district court, the court of appeals and before this Court. Counsel for Petitioners learned less than 56 hours before the filing of this Petition that Haitian refugees who had been returned to Haiti under faulty procedures were persecuted upon their return, and fled a second time out of the country and were taken to Guantanamo Naval Base. *See* Declaration of James A. Rogers of Feb. 9, 1992, Exhibit A submitted with Petitioners' Application for Stay. The persecution of persons returned to Haiti is an essential element in Petitioners' claims in regard to irreparable harm, particularly when balanced against an alleged emergency by the Respondents necessitating repatriation of persons at Guantanamo. The government precludes Petitioners' counsel from obtaining this information in a timely fashion for its use in proceedings in this case. There is something fundamentally wrong with a judicial process that would permit opposing counsel and the opposing party to control when, and under what circumstances, Petitioners' counsel may see his clients. Indeed, this practice undermines the integrity of judicial administration by preventing the court itself from having access to the truth. Unless the Court grants certiorari, neither the reality nor the appearance of fairness will characterize the administration of justice in the final resolution of the factual and legal issues in this internationally significant case.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

A. The Panel Majority Decision Below Constitutes An Unprecedented Acceptance Of Content-Based Regulation Of Speech

The majority below upheld the Respondents' efforts to engage in content-based discrimination under the First Amendment by prohibiting Petitioner HRC, Inc. and its attorneys from communicating with class

readiness for a two week period. App. 76 (Leahy Dep. at 43). In addition, Leahy acknowledged that press members, VIPs and other persons were taken on Coast Guard cutters during the interdictions after the Aristide overthrow while HRC was being denied access. App. 76 (Leahy Dep. at 41).

members while permitting others access to Guantanamo on the basis of the content of their message.

> The record reveals that the government has indeed discriminated against HRC based upon the content of its speech. The district court found that the government has 'opened the camps to members of the press and to representatives of the United Nations High Commission on Refugees.' It has allowed access to the refugees to many individuals and groups. But, it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them.

App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 6). This purpose was most directly expressed by John W. Cummings, Acting Assistant Commissioner for Refugee, Asylum and Parole, who conceded that the true reason for the total ban on lawyer access to Guantanamo was that "it would result in advising [the Haitians] as to the process ..." App. 75 (Cummings Dep. at 88).

This Court has recognized that whatever authority the Executive Branch may have to regulate speech in a public or nonpublic forum: "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (O'Connor, J., for the court) (access to government employees on government property). *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501, 508 (1991) ("Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment (citation omitted) ... The First Amendment presumptively places this sort of discrimination beyond the power of the government"). In this case, the Respondents, while allowing the press, ministers, other organizations and even other lawyers to meet and speak with HRC's members and class counsel's clients, have prevented Petitioners from having any communication whatsoever with the Petitioners. The ban was not incidental, but rather intentionally designed to prevent HRC and counsel from providing their message or advice to the Petitioners. This Court should grant certiorari to reverse this blatant effort

to limit speech based on its content.[19]

B. The Majority Panel Opinion Is In Conflict With This Court's Decisions And Imposes An Impermissible Burden On The Attorney-Client Relationship By Erecting A Total Barrier To Attorney-Client Communications

The panel majority's holding erects a total barrier to attorney-client communications, conflicting with the long-standing jurisprudence of this Court, invalidating practices that impose even lesser burdens on the attorney-client relationship. *See Geders v. United States*, 425 U.S. 80 (1976) (invalidating a ban on communication between a defense counsel and his client during an overnight recess of the trial at the time when the client was on the witness stand); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) (judicial practice prohibiting out-of-state lawyers from appearing pro hoc vice held to constitute an impermissible intrusion on the attorney-client relationship); *Gulf Oil Co. v. Bernard*, 452

[19] The majority seeks to submerge Petitioners' viewpoint discrimination claim by asserting that "the district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination." App. 56 (Feb. 4 appellate order at 32 n.7). This technique illustrates how the panel majority ignores and openly distorts the record, and seeks to create an untrue record, in an apparent effort to bury the substantial merits of Petitioners' claims. Although the district court in its December 3, 1991 opinion noted that, at that point in time, no viewpoint discrimination had been alleged, its subsequent order of December 20, 1991, which was the subject of the instant appeal and directly before the court of appeals, the district court stated that the Respondents had banned access by HRC attorneys, while it had "opened the camps to members of the press and to representatives of United Nations High Commission on Refugees." App. 46 (Dec. 20 order at 9). Respondents' refusal to allow access by HRC counsel, while permitting access by these other groups, was based on the content of the message they feared HRC counsel would communicate. App. 75 (Cummings Dep. at 88). Moreover, Respondents' actions in "opening the camps" to the messages of other groups, but not those of HRC counsel, is further supported by the affidavits of Wenski and Punancy, App. 68 (Wenski Aff.) and App. 31, Exhibit A (Punancy Aff.), neither of which was objected to by respondents. Under Fed. R. Civ. P. 15(b), as a result, the viewpoint-discrimination claim "shall be treated in all respects as if [it] had been raised in the pleadings." No amount of result oriented jurisprudence justified note 7 of the panel majority's decision and it is not denied by the facts of this record.

U.S. 89 (1981) (invalidating order banning communication with counsel of potential class members).

Class action counsel have a special need, and a special ethical responsibility, to communicate with members of the class. Communication is necessary both to provide information and to give advice to class members so that they may participate in the making of litigation decisions and meaningfully exercise their rights, and also so that counsel can obtain information from them needed for the prosecution of a class action. As a result, court orders limiting communication by class counsel with members of the class are strongly disfavored. *See Gulf Oil Co. v. Bernard, supra.*

The circuit court sought to affirm a total ban on the attorney-client relationship by asserting that since the Haitians have no recognized substantive rights, "it would be nonsensical to find that HRC possesses a right of access to the interdicted Haitians for the purpose of advising them of their legal rights." App. 56 (Feb. 4 appellate order at 34). This analysis is profoundly circular, is legally and factually untenable, and conflicts with other decisions of this Court. In *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1979), this Court recognized that the right of a person to impart information is not dependent on the right of the person in custody to receive it. This is also true in the immigration context. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) recognized that whether persons outside the U.S. had any rights, the professors inviting Mandel clearly had First Amendment rights.[20]

The court of appeals took an impermissibly restrictive view of the role of counsel in communicating with his clients. Consultation with and advice to members of the class is essential to aid in their participation in the screening procedures to which they are being subjected by Respondents, even if they have no right to complain about whether or not the procedures are being conducted fairly. Indeed, as the district court found, such assistance can only facilitate the proper effectuation of the screening process. App. 42 (Dec. 3 Mem. Op. at 50-51).

Moreover, many class members may have additional rights in the proceedings of which they may be unaware. These individuals have a vital need for information and advice concerning such rights. It is possible, for example, that some of these individuals may have alternative bases for seeking relief from interdiction, from return, or for legal entry into the

[20] Moreover, as Judge Hatchett recognized in his dissent, "such a determination of the Haitians' rights should be made only after they have received the benefit of counsel." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 9).

U.S. Some, indeed, may be resident aliens entitled to entry, as was the case of an affiant in this very proceeding. *See* App. 2, Exhibit A (Jolicoeur Aff.). Counsel's need to communicate with class members also extends to the need to advise class members concerning what it means to participate as a member of a class in a class action, what rights they have to opt out of the class, the consequences of not doing so, and other strategic decisions that may be made in litigation, including settlement. The lower court's opinion displays a truncated conception of the role of counsel that is contrary to the precedents of this Court, and warrants review.

C. The Holding Below Conflicts With This Court's Settled First Amendment Jurisprudence

As this Court and the lower federal courts have recognized in cases litigated over the past dozen years, Petitioner Haitian Refugee Center, Inc. is a political action organization which provides legal representation to Haitian refugees as a major aspect of its political activities.[21] As a result, HRC has a First Amendment right to inform individuals of their rights, at least when they do so, as here, as an exercise of political speech, without expectation of remuneration. *See In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). This is most clear when, as here, the association seeks to provide representation to its members in judicial proceedings, but is also true when the association seeks to provide representation to its members in administrative proceedings "to advocate their causes and points of view ..." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *United Mine Workers District 12 v. Illinois State Bar Ass'n.*, 389 U.S. 217 (1967). The court below sought to avoid this clear conflict with controlling Supreme Court precedent by its asserted distinction that class members were in custody. But this Court has never suggested that the First Amendment does not apply when persons seek to convey their message to those in custody. *See*

[21] *E.g., McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 894 n.8 (1991); *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (*en banc*), *aff'd on other grounds*, 472 U.S. 846 (1985); *Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. 864, 874-75 (S.D. Fla. 1988); *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, 531-32 (S.D. Fla. 1980), *aff'd as modified sub nom., Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974). As this Court recently stated in *Thornburgh v. Abbott*, ___ U.S. ___, 109 S.Ct. 1874, 1878 (1989), in citing numerous Court precedents, "nor do [prison walls] bar free citizens from exercising their own constitutional rights by reaching out to those on the inside." The lower court's claim that custody bars a person from communicating his ideas to those political refugees "inside," thus directly conflicts with numerous decisions of this Court.[22]

D. The Panel's Opinion Violates The Governing Interpretation Of The Treaty, Statutory, And Administrative Provisions Protecting Refugees Fleeing Persecution And Offends Controlling Precedents Of This Court Establishing A Strong Presumption In Favor Of Judicial Review

All relevant international and federal law mandate a single, unambiguous directive: that the executive *shall not return* political refugees to a country where they will face persecution or death because of their political views. That directive entails two necessary safeguards: that the Executive will employ regular and meaningful *procedures* to determine whether a refugee will face political persecution; and that such administrative decisions are not committed to agency discretion, but fully subject to *judicial review* under the Administrative Procedure Act. The majority opinion below rendered erroneous rulings regarding Article 33 of the United Nations Convention and Protocol on the Status of Refugees, the U.S.-Haitian interdiction agreement and the accompanying Executive Order and INS Guidelines, Section 243(h) and 208 of the INA, and the Administrative Procedure Act. Taken together, those rulings have

[22] The panel majority's assertion regarding the difficulties with access, App. 56 (Feb. 4 appellate order at 36-37), ignores the issue on appeal, which was not the time, place and manner of the access, but the Respondents' insistence on a total ban. It also assumes facts which were not in the record in this case. App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 8-9). The panel majority decision also conflicted with the Eleventh Circuit's own controlling precedent, which previously had rejected this very distinction, and applied *Primus* and *Button* in the identical situation involving access to excludable aliens held in custody by the Immigration and Naturalization Service. *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (*en banc*) ("counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration").

effectively nullified the rule of law in this case by gutting both the directive *and* the safeguards.

Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees is a solemn undertaking by our nation not to return persons to a country where their life or freedom would be threatened. As the uncontradicted record in this case demonstrates, Petitioners fear and risk "death or persecution," App. 42 (Dec. 3 order at 55), if they are returned to Haiti. Notwithstanding the significance of Article 33, the panel majority below, without discussing the irreparable harm to Petitioners if they were forcibly returned to Haiti, limited its consideration of the applicability of Article 33 to one sentence. App. 56 (Feb. 4 appellate order at 3). The applicability of Article 33 to the Petitioners in this case, who number in the thousands, as well as countless other refugees outside this case, raises significant and recurring questions that this Court should address. This Court, just this term, referred to Article 33 and our mandatory "obligation" under it on at least two occasions. *United States v. Ray, supra; INS v. Doherty, supra*. The panel majority's insufficient treatment of this issue deserves review in light of the recurring importance of this question.

This case also raises important and recurring questions concerning the interpretation of the agreement between the United States and Haiti about interdiction and the Executive Order implementing that interdiction. The administration of this controversial Interdiction Program singling out Haitians warrants this Court's review. As in its treatment of Article 33, the panel majority provided little analysis of the applicability of the Executive Order, notwithstanding its central importance as the document under which all exercise of Executive power in this case may, or may not, be justified. App. 56 (Feb. 4 appellate order at 21-22).

This case similarly raises important and recurring questions concerning the interpretation of INA §§ 243(h) and 208. Section 243(h) reflects a committment by the United States not to deport or return a person to a country whose life or freedom would be threatened. In light of the continuing nature of the Interdiction Program and the substantial likelihood that persons from other countries will seek refuge in the United States, this Court should grant review to correct the panel's serious misinterpretation of the law.

Most egregiously, the majority opinion rejects applicability of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA") on the ground that judicial review is precluded under 5 U.S.C. § 701(a)(1). Although no express preclusion of judicial review is contained in any relevant statute or reflected in Congressional intent, the majority finds that

preclusion must have been *intended* by Congress as a result of the statutory scheme under the INA in which judicial review is limited in the deportation and exclusion contexts. *See* 8 U.S.C. §§ 1252(b), 1105(a). *See Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). This approach, however, is flatly inconsistent with the decisions of this Court in *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991), and *Jean v. Nelson*, 472 U.S. 846 (1985). Thus, despite the identical limitations of judicial review in the exclusion and deportation contexts, neither being involved here, this Court applied the broad presumption in favor of judicial review to permit review of procedures applied by the Immigration and Naturalization Service in regard to the processing of applications for Special Agricultural Worker status (*McNary*), and decisionmaking concerning the release of excludable aliens from detention (*Jean*).

In addition, the court of appeals decision is flatly inconsistent with the approach of this Court in *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) and *Marcello v. Bonds*, 349 U.S. 302 (1955). While the district court recognized that Petitioners' claims were not based on a challenge to any individual alien's determination, but rather on the procedures used in making such determinations, a distinction recognized by the majority below, App. 56 (Feb. 4 appellate order at 20), the majority wholly failed to address such decisions as *Bowen* and *McNary*, which recognize the distinction with regard to judicial review between the substantive determination made by an agency, and the method it utilizes in reaching it.

Moreover, the APA provides that a "[s]ubsequent statute may not be held to supercede or modify this subchapter, chapter 7 [the judicial review provisions of the APA] ... except to the extent that it does so expressly." 5 U.S.C. § 559. In *Marcello*, this Court recognized that only when Congress expressly so provides will the APA be held inapplicable. Here, however, there is no such express indication by Congress, and Congress' limited review provisions for exclusion and deportation cannot be deemed to reflect an express intent that the APA not apply with regard to judicial review of immigration action in other contexts, as *McNary* and *Jean* hold.[23]

[23] That the majority's opinion conflicts with controlling authority of this Court is further demonstrated by the fact that the majority relies for its preclusion holding on *Braude v. Wirtz*, 350 F.2d 702 (9th Cir. 1965) and *Cobb v. Murrell*, 386 F.2d 947 (5th Cir. 1967), both of which have been eclipsed by subsequent decisions of this Court, and two decades ago, it was obvious that "their holdings are no longer

The majority below also found the APA inapplicable under 5 U.S.C. § 701(a)(2) on the ground that INS action here is committed to agency discretion. While acknowledging that this is a "narrow" standard applicable only where there is "no law to apply," App. 56 (Feb. 4 appellate order at 20, *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)), the majority finds that the broad discretion granted the President under 8 U.S.C. § 1182(f), one of the provisions relied on by the President in adopting Executive Order 12324 establishing the Haitian Interdiction Program, commits to agency discretion all procedural questions concerning implementation of the Interdiction Program. App. 56 (Feb. 4 appellate order at 21). Although citing the "no law to apply" standard of *Overton Park*, the majority below grossly misapplies this "narrow" exception by ignoring the clear and mandatory standards in the Executive Order itself, as well as the established distinction between review of the substance of an agency's determination and the method it uses in reaching it. *See Bowen, supra*; *McNary, supra*.

The Executive Order upon which the majority relies states that "no person who is a refugee will be returned without his consent." Not only does this supply the substantive law to apply, but the Executive Order also mandates fair process in the application of the standard: "The Attorney General shall ... take whatever steps are necessary to insure the fair enforcement of our laws relating to immigration (including effective implementation of this Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." App. 2, Exhibit B (Executive Order 12324, § 3). Under the majority's approach, where there is substantive law to apply but not detailed specification of procedural standards, an agency could make the relevant substantive determination by flipping coins, and this would be committed to agency discretion. Although the substance of agency decisions sometimes is committed to agency discretion, the procedure used by an agency in reaching its decisions never is, but is always open to judicial review for procedural fairness. *See Bowen, supra; McNary, supra*.

The majority below ignores the fact that the governmental action challenged here is not that of the President, but rather, that of subordinate governmental officials carrying out the President's directives. There is ample law to apply that constricts the discretion of such officials, including the Executive Order itself, INA § 243(h), and the INS Guidelines (P.E. at 8-11). The regulations pursuant to INA § 243(h) and the INS Guidelines

tenable." *Secretary of Labor v. Farino*, 490 F.2d 885, 889 (7th Cir. 1973).

themselves set forth detailed procedures, which were not followed here, that constrict agency action and provide a source of law for a reviewing court to apply. Certiorari should be granted to review the unprecedented approach to the "committed to agency discretion" doctrine of the majority opinion, which would broaden the exception considerably beyond the "exceedingly narrow" one contemplated by *Overton Park*.

Respectfully submitted,

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(305) 444-0060

By: _____
IRA J. KURZBAN, ESQ.

EXHIBITS

Executive Order 12324 of September 29, 1981
Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1) in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, and in order to carry out the suspension and interdiction of such entry which have concurrently been proclaimed, it is hereby ordered as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Section 2.(a) The Secretary of the Department in which the Coast Guard is operating shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended (48 U.S.C. § 1451 et seq.), or owned in whole or in part by the United States, a citizen of the United States or a corporation incorporated under the laws of the United States of any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. TLAS 5200; 13 UST 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate

directive providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

(3) To return the vessel and its passengers to the country from which it came when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist: provided, however, that no person who is a refugee will be returned without his consent.

(d) These actions, pursuant to this Section, are authorized to be undertaken only outside the territorial waters of the United States.

Section 3. The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating to take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

THE WHITE HOUSE
September 29, 1981

U.N. CONVENTION RELATING TO THE STATUS OF THE REFUGEES

ARTICLE 33

PROHIBITION OF EXPULSION OR RETURN ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

HAITI

Migrants -- Interdiction

Agreement effected by exchange of notes
Signed at Port-au-Prince September 23, 1981;
Entered into force September 23, 1981.

The American Ambassador to the Haitian Secretary
of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
PORT-AU-PRINCE, HAITI

No. 237 September 23, 1981

Excellency:

I have the honor to refer to the mutual concern of the Governments of the United States and of the Republic of Haiti to stop the clandestine migration of numerous residents of Haiti to the United States and to the mutual desire of our two countries to cooperate to stop such illegal migration.

The United States Government confirms the understandings discussed by representatives of our two governments for the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.

Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January

1967,* the United States Government confirms with the Government of the Republic of Haiti its understanding of the following points of agreement:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

The Government of the Republic of Haiti also agrees in the case of a U.S. flag vessel, outbound from Haiti, and engaged in such illegal trafficking, to permit, upon prior notification, the return to a Haitian port of that vessel and those aboard.

In any case where a Haitian flag vessel is detained, the authorities of the United States Government shall promptly inform the authorities of the Government of the Republic of Haiti of the action taken and shall keep them fully informed of any subsequent developments.

The Government of the Republic of Haiti agrees, to the extent permitted by Haitian law, to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise

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* TIAS 6577; 19 UST 8223.

agrees, to the extent permitted by United States law, to prosecute traffickers of United States nationality and to confiscate United States vessels engaged in such trafficking.

The Government of the United States agrees to the presence of a representative of the Navy of the Republic of Haiti as liaison aboard any United States vessel engaged in the implementation of this cooperation program.

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

In furtherance of this cooperative undertaking the United States Government formally requests the Government of the Republic of Haiti's consent to the boarding by the authorities of the United States Government of private Haitian flag vessels [in any case] in which such authorities have reason to believe that the vessels may be involved in the irregular carriage of passengers outbound from Haiti.

I have the honor to propose that, if the foregoing is acceptable to the Government of the Republic of Haiti, this note and Your Excellency's confirmatory reply constitute an agreement between the United States Government and the Government of the Republic of Haiti which shall enter into force on the date of your reply and shall continue in force until six months from the date either government gives notice to the other of its intention to terminate the agreement.

Accept, Excellency, the renewed assurances of my highest consideration.

ERNEST H. PREZO

His Excellency
Edouard Francizque
Secretary of State for Foreign Affairs
Port-au-Prince

U.S. IMMIGRATION AND NATURALIZATION SERVICE

INTERDICTION GUIDELINES AND OPERATION INSTRUCTIONS

HMIO

PURPOSE

To stop the clandestine migration of numerous residents of Haiti to the United States while insuring through direct interview that the United States is in compliance with its obligations regarding actions toward refugees.

AUTHORITY

Presidential Proclamation Number 4865 dated September 29, 1981 (High Seas Interdiction of Illegal Aliens).

Executive Order Number 12324 dated September 29, 1981 (Interdiction of Illegal Aliens).

Associate Attorney General's directive to the Acting Commissioner of INS, dated October 2, 1981.

Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

CHAIN OF COMMAND

INS employees involved in HMIO activities will be under the direct line supervision of the Associate Commissioner, Examinations, Central Office through the Assistant Commissioner for Refugee, Asylum, and Parole who has direct responsibility for the HMIO program.

INS employees involved in HMIO activities are subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessels. All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel. All announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and

passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

INS ROLE IN AND GUIDELINES FOR INTERDICTION AT SEA

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation Number 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

GENERAL

* Due to the sensitive nature of this assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

* The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

* The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters related to the interview of persons on board with respect to documentation relating to entry into the United States and possible evidence of refugee status.

* Except for independent determinations with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

AUTHORITY

Presidential Proclamation Number 4865, dated September 29, 1981.

Executive Order Number 12324, dated September 29, 1981.

Associate Attorney General's directive to the Acting Commissioner, INS, dated October 2, 1981.

Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

BOARDING OF VESSELS

* All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

* INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

* All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

INS OFFICER RESPONSIBILITIES

A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person's name, date of birth, nationality, home town, all documents or evidence presented, and the reason for departure.

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicant concerning the claim).

CHANGES

The above provisions are subject to revision ...

No. 91-1292

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAITIAN REFUGEE CENTER, ET AL., PETITIONERS

v.

JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a challenge to an interdiction program established by the President. Under that program, Haitian aliens seeking illegal entry into the United States are interdicted on the high seas and repatriated to Haiti, unless they establish a credible claim to refugee status. The questions presented are:

1. Whether Article 33.1 of the United Nations Convention on the Status of Refugees affords the petitioner Haitian migrants any enforceable rights in United States courts with respect to the operation of the interdiction program outside the territory of the United States.

2. Whether any judicially enforceable rights are conferred on the Haitian migrants by the Executive Order establishing the interdiction program, internal operating guidelines issued by the Immigration and Naturalization Serevice, or Sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1158(a) and 1253(h).

3. Whether the petitioner Haitian migrants have a cause of action to challenge the interdiction program under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

4. Whether injunctive relief barring repatriation of Haitian migrants is in any event barred by equitable principles.

5. Whether petitioner Haitian Refugee Center has a right under the First Amendment to have its representatives board Coast Guard cutters on the high seas and enter the United States Naval Base at Guantanamo Bay, Cuba, to speak with and advise interdictees who are held in custody.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting aliens on the high seas. See 8 U.S.C. 1182(f), 1185(a). That program, begun in 1981, stems from a Presidential determination that uncontrolled illegal immigration by sea is a "serious national problem." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). Accordingly, the President, by Executive Order, directed the Coast Guard to intercept vessels suspected of transporting illegal immigrants and to return all of the passengers to their country of origin, subject to the proviso that any "person who is a refugee" is not to be repatriated without his consent. Exec. Order No. 12,324, § 2(c)(3) (Pet. Exh. 1-2).[1] Contemporaneously, the United

[1] As used herein, "Pet. Exh." refers to the exhibits included in the bound certiorari petition; "Pet. App." refers to the six volumes

States entered into a bilateral agreement with Haiti, under which U.S. officials are permitted to interdict and board Haitian flag vessels suspected of carrying illegal immigrants. Agreement Effected by Exchange of Notes, Sept. 23, 1981, United States-Republic of Haiti, 19 U.S.T. 8223, T.I.A.S. No. 10,241 (Pet. Exh. 4-6).

The interdiction program has been a very effective tool in the enforcement of our immigration laws. It has also saved countless lives. Most vessels interdicted have been "grossly overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced sailors." 11/20/91 Decl. of Rear Admiral Leahy ¶ 4 (Gov't Stay App. B, Exh. 3). Many of these vessels could not have completed the 500-mile voyage to the United States. Between 1981 and 1991, more than 25,000 would-be migrants were interdicted. *Ibid.* A State Department study of migration patterns from Haiti over that period "indicates that increased outflows tend to coincide with periods of economic difficulty rather than any particular political factor." 12/1/91 Decl. of Robert S. Gelbard ¶ 3 (Gov't Stay App. C, Exh. 10). Thus, although the present crisis began with a military coup in Haiti on September 30, 1991, the virtual exodus of illegal immigrants from Haiti began approximately one month later, when economic sanctions were imposed. 11/20/91 Leahy Decl. ¶ 5; Gelbard Decl. ¶ 3. More than 15,000 Haitian migrants have been interdicted by the Coast Guard since October 28, 1991.

Under Section 3 of the Executive Order, the Attorney General is responsible for determining whether any of the aliens taken into Coast Guard custody are "refugees" —persons who have a well-founded fear of persecution on account of their political opinion (see 8 U.S.C. 1101 (a)(42)(A); *INS v. Elias-Zacarias*, No. 90-1342 (Jan. 22, 1992), slip op. 4)—who should not be repatriated. To implement this directive, the Immigration and Naturali-

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of appendices filed by petitioners; and "Gov't Stay App." refers to the appendices to the Application for a Stay Pending Appeal we filed in this Court on January 30, 1992.

zation Service (INS) developed screening procedures, which are set forth in internal "guidelines" (Pet. Exh. 7-9) and further described in declarations filed below. 11/20/91 Decl. of Leon Jennings (Gov't Stay App. B, Exh. 5); 12/10/91 Decl. of Gregg A. Beyer ¶¶ 3-4, 8-15 (Gov't Stay App. G).

Under the procedures, an INS official first interviews the interdicted aliens on board the Coast Guard cutter to identify any aliens who make a credible showing of refugee status. The INS guidelines create an informal, non-adversarial process to permit expeditious identification of potential refugees so that the Coast Guard can immediately return other interdicted aliens to their country of origin. Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158(a). These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otherwise qualify for the discretionary relief of asylum. Any aliens who are initially "screened in" but ultimately not granted asylum are then to be returned to their country of origin, consistent with procedures afforded under the INA.

2. On November 19, 1991, immediately following the resumption of repatriations (which the Executive Branch had temporarily suspended in the wake of the coup in Haiti), petitioner Haitian Refugee Center (HRC) filed this action for injunctive relief against officials of the Department of State, the Coast Guard, and INS. Although the D.C. Circuit had previously held that HRC (a private, non-profit corporation in the United States) did not have standing to bring many of the same claims affecting Haitians interdicted on the high seas,[2] the dis-

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[2] *HRC* v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987). In a separate opinion, Judge Edwards rejected HRC's claims on the merits, con-

trict court, within a few hours, granted HRC's application for a temporary restraining order (TRO) barring repatriations. Because the United States was unable to appeal the TRO, it was compelled fundamentally to alter the interdiction program. Although the Coast Guard continued to interdict the Haitian migrants, they could not be returned to Haiti or kept indefinitely on the decks of Coast Guard cutters; the interdictees therefore were transported to the U.S. Naval Base at Guantanamo Bay, Cuba, where they could be temporarily housed in shelters under the custody of the Department of Defense and INS. In the interests of continuity and uniformity, however, INS continued to conduct the initial screening interviews at Guantanamo pursuant to the informal, nonadversarial procedures utilized aboard Coast Guard cutters. While the TRO was in effect, the district court also ordered discovery that permitted representatives of HRC to have access to individual Haitians at Guantanamo. Pet. App. 41, 63. HRC then filed an amended complaint, in which it named some individual Haitians, to whom it obtained access only through discovery as plaintiffs and as representatives of a class. Pet. App. 62; Gov't Stay App. F.

3. On December 3, 1991, the district court entered a preliminary injunction against repatriation based on two of petitioners' numerous claims—those arising under Article 33 of the U.N. Convention and the First Amendment. Pet. App. 42.[3] The government took an immediate appeal,

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cluding that the interdiction program violated no rights of the Haitians under the INA, the Constitution, or Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. 809 F.2d at 837-841. The United States acceded in 1968 to the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, which bound parties to adhere to Articles 2-34 of the Convention.

[3] The district court found, however, that petitioners had not shown a probability of success on their remaining claims under the Fifth Amendment, INA, Executive Order, INS guidelines, and Administrative Procedure Act (APA). Pet. App. 42, at 52-55.

and on December 17, 1991, the court of appeals dissolved the preliminary injunction. Pet. App. 43. The court instructed the district court to dismiss the claims under Article 33, holding that it is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs. *Id.* at 3. It also held that HRC's claim of a First Amendment right of access to the interdictees could not support the district court's order barring repatriation of the interdictees, since that relief did not redress any right asserted by HRC. *Id.* at 3-4.[4] Judge Hatchett dissented.

4. On the evening of the day the court of appeals ruled, the district court granted another "temporary" order against repatriation of the Haitian interdictees, this time based on the same APA claims that it had rejected just fifteen days earlier. Pet. App. 44. On December 19, 1991, the court of appeals, again over Judge Hatchett's dissent, granted the government's motion for an emergency stay of that order. Pet. App. 45. On the following day, however, the district court entered yet another injunction against repatriation, this time based on HRC's asserted constitutional right of "access" to Guantanamo to confer with interdictees. Pet. App. 46. Despite the government's immediate appeal of that order and request for an immediate stay, the court of appeals allowed the injunction to stand pending expedited briefing and argument. In late January, when the tide of Haitian emigration increased significantly and threatened disruption of the Nation's foreign policy interests and military operations on the high seas and at Guantanamo, the government renewed its motion for a stay. After the court of appeals failed to respond, the government sought a stay of the injunction from this Court. The Court granted a stay on January 31, 1992, and the court of appeals granted a stay as well. Pet. Stay Applic. 19-21.

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[4] Petitioners' suggestion of rehearing *en banc* with respect to the Article 33 ruling was rejected on January 28, 1992, with no judge having requested a formal poll of the court. Pet. App. 51.

5. On February 4, 1992, the court of appeals rendered a thorough decision rejecting all of petitioners' remaining claims and ordering dismissal of the complaint for failure to state a claim on which relief can be granted. Pet. App. 56. The court first held that petitioners have no right to judicial review under the APA, relying on the exceptions where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." *Id.* at 14-24; see 5 U.S.C. 701(a)(1) and (2). With respect to the former, the court recognized that it must "look not only at the express language of the statute but the statutory scheme as a whole." Pet. App. 56, at 15 (citing *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). It noted that the relevant substantive and judicial review provisions of the INA apply only to aliens within the United States (8 U.S.C. 1105a, 1158, 1253), and that judicial review is unavailable for persons, such as the Haitian aliens here, who are outside the United States. On this basis, the court held that "review under the APA is foreclosed because the relevant provisions of the INA provide the sole and exclusive avenue for judicial review." Pet. App. 56, at 16. In its view, this conclusion was further supported by case law holding that aliens outside the United States have no right to review of immigration determinations. *Id.* at 16-19.

In finding that the actions petitioners challenge are also "committed to agency discretion by law," the court acknowledged the narrowness of that exception but noted the breadth of the discretion afforded the President by 18 U.S.C. 1182(f) and the absence of any statutory limits on interdiction and repatriation activities and procedures. Pet. App. 56, at 20-21. It further held that, even assuming that other possible sources of law (*e.g.*, the Executive Order, INS guidelines, or the Convention) could form the basis of an APA action, none provided meaningful standards for review of the issues in this case—*i.e.*, the manner in which INS is to conduct refugee

screening in the high seas interdiction program. *Id.* at 21-23.

The court of appeals next addressed various theories advanced by the Haitian petitioners that even the district court had rejected. Thus, it held that the INA, as amended by the Refugee Act of 1980, affords no independent basis for relief. Pet. App. 56, at 25-27. The court reasoned that 8 U.S.C. 1253(h), like the entirety of the Section in which it appears, applies only to aliens "in the United States." Pet. App. 56, at 26 (quoting 8 U.S.C. 1253(a)). The court also noted that the asylum provision, 8 U.S.C. 1158, applies only to aliens "physically present in the United States or at a land border or port of entry," and it rejected petitioners' argument that the high seas become the "functional equivalent" of a port of entry whenever the United States conducts interdiction operations. Pet. App. 56, at 26-27. The court of appeals likewise rejected petitioners' argument that either the Executive Order or the INS guidelines could themselves—independently of the APA—create a private cause of action. *Id.* at 28-30. In its view, the terms and purposes of the Executive Order—which specifically contemplates "a procedure taking place entirely on the high seas"—could not have been intended to confer a right of judicial review. *Id.* at 28. The court also ruled that the INS guidelines were intended simply to provide internal instructions to INS employees, and lack the "force and effect of law" necessary for judicially enforceable rights. *Id.* at 28-30.

Finally, the court rejected petitioner HRC's claim that it has a First Amendment "right of access" to Haitian interdictees on board Coast Guard cutters or at Guantanamo. Pet. App. 56, at 30-38. It first concluded that the precedents upon which HRC and the district court chiefly relied—*NAACP* v. *Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978)—do not support a broad right of access to persons in government custody, but rather "recognize a narrow First Amendment right to associate for the purpose of engaging in litiga-

tion as a form of political expression." Pet. App. 56, at 34. Because such a right of association is "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant," the court believed it "nonsensical" to find such a right here, since the interdicted Haitians have no enforceable rights under the Constitution or laws of the United States. *Ibid.*

Finally, the court of appeals held that even if HRC had a right to associate with interdicted Haitians, the First Amendment does not impose upon the federal government an affirmative obligation to assist it in exercising that "right" by affording access to aliens in custody aboard Coast Guard ships on the high seas or at a military base in a foreign country. Pet. App. 56, at 34-37. The court recognized that affording such access to HRC would impose substantial burdens on the United States, *id.* at 36-37, and emphasized that the only other appellate decision directly on point had squarely rejected the notion that the government must assist citizens wishing to communicate with aliens who are in custody awaiting administrative proceedings. *Id.* at 37-38 (discussing *Ukrainian-American Bar Ass'n* v. *Baker*, 893 F.2d 1374 (D.C. Cir. 1990)).[5]

ARGUMENT

The court of appeals properly rejected petitioners' unprecedented assault upon the prerogatives and duties of the Executive Branch to carry out the Nation's foreign relations, direct military operations abroad, and control illegal immigration. For more than two months, a series of district court injunctions stymied the efforts of the Executive Branch to implement its longstanding policy

[5] Judge Hatchett dissented. He agreed with the majority that HRC has no constitutional right of access to Coast Guard ships on the high seas, but believed that HRC has a right of access to aliens in custody at Guantanamo. Pet. App. 56, at 4-9 (dissenting opinion). Judge Hatchett also disagreed with the majority's APA analysis. *Id.* at 10-25. He did not address petitioners' remaining claims. *Id.* at 1 n.1.

of interdicting and promptly repatriating Haitian migrants attempting to enter this country illegally. These judicial intrusions into matters committed to the Executive Branch were utterly without basis in the Constitution and laws of the United States, and the court of appeals' holding that petitioners' complaint must be dismissed for failure to state a claim is fully consistent with the decisions of this Court and other courts of appeals. Indeed, with respect to the central legal issues, three other courts of appeals—like the court below—have held that Article 33 of the Refugee Convention is not self-executing (see pages 13-14, *infra*), and the only other court of appeals to have considered the First Amendment claim HRC raises—the D.C. Circuit in *Ukranian-American*—has likewise rejected it. Accordingly, the legal issues petitioners raise plainly do not warrant review by this Court.

In addition, the district court's sweeping injunctions barring repatriations were wholly improper on equitable grounds. The injunctions fundamentally defeated the purposes of the interdiction program, required the United States to establish camps for Haitian migrants at Guantanamo Naval Base, necessitated the substantial diversion of resources from other military and law enforcement tasks, and interfered with the conduct of the Nation's foreign relations regarding Haiti and Cuba. Separation of powers principles commit such matters to the political Branches, and preclude the judiciary from granting the extraordinary equitable relief of an injunction having such adverse effects.

This Court's stay of January 31—and the court of appeals' own stays and rulings rejecting petitioners' claims on the merits—have now freed the responsible Executive Departments to carry out the interdiction program and conduct the Nation's foreign policy and military operations at Guantanamo and on the high seas without the direct judicial interference under which they labored for more than two months. But the United

States remains committed to restoring democratic rule in Haiti, ensuring that interdictees who truly are refugees under established legal standards are not returned to Haiti without their consent, holding the de facto authorities in Haiti to that country's commitment not to prosecute or persecute individuals because of their departure, and monitoring the repatriation process and related events in Haiti to guard against any persecution of the returnees and others. Since the stays were entered by this Court and the court of appeals on January 31, the repatriation of interdictees who were found not to have a colorable claim of refugee status has proceeded on a regular basis, without incident and without credible reports of retaliation against the returnees.

This case was launched by an ill-considered TRO barring repatriations that was issued at the behest of an organization (HRC) that had no standing to seek that relief; it has since taken on a life and regime of its own and has, regrettably, driven significant aspects of the Nation's immigration, military and foreign policy. We now respectfully request the Court to bring the litigation to a definitive close by an immediate denial of certiorari. That disposition would remove the shadow that the case continues to cast over the Nation's policies concerning Haiti and the Executive's conduct of its constitutionally assigned responsibilities.

A. 1. Petitioners first contend (Pet. 17, 25-26) that the repatriation of Haitian interdictees violates Article 33.1 of the U.N. Convention. That contention is without merit for a number of reasons.

a. In the first place, Article 33.1 is simply inapplicable in this case. The text of the Article, its negotiating history, and its implementation by the United States all support the official interpretation by the Department of State—which is entitled to great weight, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)—that Article 33.1 applies only to refugees within the territory of the contracting State.

Article 33.1 provides that a contracting State shall not "expel or return ('refouler') a refugee" to the frontiers or territories where his life or freedom would be threatened for political reasons. Pet. Exh. 3. Although petitioners avoid any discussion of the geographic scope of Article 33.1 in their certiorari petition, they invoke (Pet. 17, 25) Article 33.1 to challenge their "return" to Haiti. Petitioners fail to appreciate, however, that the term "return" in Article 33.1 is expressly defined by the parenthetical insertion of the French word "refouler." As relevant to this case, *Cassell's French Dictionary* 627 (1978), defines "refouler" to mean "expel (aliens)"—a definition that obviously encompasses only aliens physically present in the territory of the contracting State. This construction is confirmed by paragraph 2 of Article 33, which provides that the benefit of non-refoulement may not be claimed by a refugee who is a danger to the security of "the country in which he is." Pet. Exh. 3.

The negotiating history also bears out this interpretation. The delegates to the drafting Conference placed in the record the Conference's understanding that the word "expel" in Article 33.1 refers to a "refugee already admitted into a country," while the term "return ('refouler')" refers to a "refugee already within the territory but not yet resident." The delegates also placed in the record their understanding that the "possibility of mass migrations across frontiers or of attempted mass migrations"—the precise context in which this case arises—"was not covered by article 33." This history was quoted and relied upon by Judge Edwards in his concurring opinion in *HRC* v. *Gracey*, 809 F.2d 794, 840 n.133 (D.C. Cir. 1987), in which he concluded that Article 33.1 does not apply to the Haitian interdiction program.[6]

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[6] These and other portions of the negotiating history that confirm the State Department's interpretation—as well as the Department's official position in diplomatic undertakings and other forums since that time—are discussed in the government's open-

Finally, the Protocol incorporating Article 33 was ratified by the United States on the understanding that it conformed to the corresponding provisions of the INA[7]; by that time, this Court had already held, in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958), that under 8 U.S.C. 1253(h) (1958), even aliens who were physically present in the United States, but not lawfully admitted, were ineligible for withholding of deportation. See *INS* v. *Stevic*, 467 U.S. 407, 415, 417-418 (1984). A fortiori, the interdictee petitioners in this case, who

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ing brief (at 16-20 & Addendum B) and reply brief (at 4-7) on the first appeal below, No. 91-6060.

Although petitioners do not address the extraterritoriality issue in the petition, they do include some discussion of the point in Appendix B to their Application for a Stay (at B17-B20). However, they fail to acknowledge the text of Article 33 that cuts against their position. Petitioners do contend (at B17-B-18) that any reliance on the negotiating history is misplaced, ignoring that this Court has made clear that such reliance is appropriate where the meaning of the treaty text is not "obvious." *See United States* v. *Stuart*, 489 U.S. 353, 365-366 (1989); *id.* at 374 (Scalia, J., concurring); *Air France* v. *Saks*, 470 U.S. 392, 400 (1985). Ironically, petitioners then proceed to rely (Stay Applic. App. B18-B19) on statements made by Louis Henkin at a meeting in 1950. However, as explained in the government's reply brief (at 6 n.8) on the first appeal below, Professor Henkin's remarks were made more than a year before the two sessions at which Article 33 was finalized, and they reacted to a different proposal. Moreover, Professor Henkin was not the United States representative at the Conference of Plenipotentiaries (where the definitive negotiating history discussed above occurred and the word "refouler" was inserted); his views were not expressed at the final sessions, and they were not adopted by the Conference.

[7] See S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson) ("Accession to the Protocol would not impinge adversely upon established practices under existing laws in the United States."); *id.* at VII, VIII (report of Secretary of State Rusk) (same); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"); 114 Cong. Rec. 29,391 (1968) (Sen. Mansfield).

are altogether outside the United States (in Cuba or on the high seas), have no rights under Article 33.1.[8] Petitioners cite no judicial ruling to the contrary. Their reliance on Article 33.1 therefore may be dismissed on this ground alone.

b. The court of appeals found it unnecessary to decide whether Article 33.1 could be judicially extended to the high seas or foreign soil, because it held that, in any event, "Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case." Pet. App. 43, at 3. That ruling (which the en banc court, without dissent, declined to disturb), is correct and is in agreement with the decisions of the other courts that have addressed the issue. See *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982) ("the Protocol's provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation"); *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.) ("no new rights or entitlements were vested * * * by operation of the Protocol"), vacated on other grounds, 434 U.S. 962 (1977); *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989) ("Neither the Handbook nor the Protocol have the force

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[8] Commentators likewise have concluded that Article 33.1 does not apply outside of a contracting party's territory. 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972); N. Robinson, *Convention Relating to the Status of Refugees: A Commentary*, at 162-163 (1953); Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 Va. J. Int'l L. 857, 861-862 (1986); Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y. Int'l L. 92, 123-124 (1969). Petitioners cite (Pet. 3, 28) the direction to the Attorney General in Section 3 of the Executive Order to ensure "strict observance" of existing "international obligations." However, Section 3 does not purport to identify specific sources of law (compare §§ 2(b)(1) and (2) (referring to the Convention on the High Seas)) or to expand any existing international obligations of the United States. The Executive Order therefore does not assist petitioners in seeking a judicial extension of Article 33.1 beyond the territory of the United States.

of law * * *. The Protocol was not intended to be self-executing."), cert. denied, 111 S. Ct. 751 (1991); *HRC* v. *Gracey*, 600 F. Supp. 1396, 1401, 1406 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).[9]

Treaties of the United States do not ordinarily create rights that are privately enforceable in U.S. courts. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); *Handel* v. *Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). An individual ordinarily can enforce a treaty in court only if it provides a private right of action. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 598-599 (1884).

Here, the text of the Protocol itself indicates that the parties did not understand it to create private rights of action, but instead contemplated implementation through the domestic law of each contracting State. Article III requires signatories to communicate the means by which they intend to implement the Protocol, thereby indicating

[9] In Appendix B to their Stay Application (at B13), but not in the certiorari petition, petitioners assert a conflict with the Fifth Circuit's decision in *Nicosia* v. *Wall*, 442 F.2d 1005 (1971). However, *Nicosia* did not discuss the self-execution issue; it simply assumed that Article 33.1 could be raised as a defense in an extradition proceeding. 442 F.2d at 1006. Moreover, the Fifth Circuit subsequently held in *Pierre*, cited in the text, that Article 33.1 is *not* self-executing. There accordingly is no circuit conflict on the issue.

Petitioners also cite (Stay Applic. App. B15) the description of the Protocol as "self-executing" in *In re Dunar*, 14 I. & N. Dec. 310, 313 (BIA 1973). However, this Court has found *Dunar* to be "not particularly probative of what the Protocol means." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.23 (1987). And contrary to petitioners' assertion, as the decision of an inferior administrative body, *Dunar* binds neither the Attorney General nor the remainder of the Executive Branch. Moreover, *Dunar* concluded—in agreement with the uniform judicial view—that the Protocol did not affect the coverage or execution of existing U.S. law. 14 I. & N. Dec. at 313-323.

that it left the matter of domestic implementation to the parties. See *Gracey*, 600 F. Supp. at 1406.[10] "Such provisions are uniformly declared executory." *United States* v. *Postal*, 589 F.2d 862, 876-877 (5th Cir.), cert. denied, 444 U.S. 832 (1979); see *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298-1299 (3d Cir. 1979). Moreover, as we have explained (see page 12, *supra*), the clear understanding of the President and Congress was that the Protocol would not itself be an independent source of rights, but rather would be subsumed within and reconciled with existing domestic law. Similarly, Congress's subsequent attempt, in the Refugee Act of 1980, to clarify domestic law to indicate its agreement with the Protocol, see *INS* v. *Stevic*, 467 U.S. at 425-428, is inconsistent with the notion that the Protocol was enforceable of its own force.[11]

[10] See also Executive Comm. of the UNHCR Programme, Conclusion No. 57 (XL), *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1989) (emphasizing "the need for the full and effective implementation of these instruments by Contracting States").

[11] While petitioners cite (Stay Applic. App. B12, B14, B16) several statements in decisions of this Court or materials preceding ratification that the Protocol is "mandatory" and "obligates" or "binds" the United States to comply with provisions of the Convention, that is not the question here. All treaties are binding and create obligations. The question is to *whom* do the obligations run? By acceding to the Protocol, the United States became obligated to other contracting States to comply with its provisions, but domestic implementation was necessary for the Protocol to be effectuated in the United States. As it happened, Section 243(h) of the INA already provided the necessary statutory mechanism for withholding of deportation. Petitioners rely (Stay Applic. App. B16) on the statement in Justice Scalia's dissenting opinion in *INS* v. *Doherty*, No. 90-925 (Jan. 15, 1992), slip op. 3, that the "nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *nonrefoulment* obligations under Article 33.1." This statement, however, indicates that the judicially enforceable rights at issue stemmed from the implementing legislation, not

But even if the Protocol were self-executing in the sense that a court (or administrative body) might refer to it for a rule of decision in disposing of a deportation or exclusion case that was otherwise within its statutorily-conferred jurisdiction, it still would not follow that the Protocol authorizes a court to fashion a novel cause of action for affirmative injunctive relief where Congress has not authorized such a suit. That is especially so as regards persons and events *outside* the United States, where the laws of the United States are presumptively inapplicable, *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991)—and where, as here, injunctive relief would interfere with military operations on the high seas and a base on foreign soil. Cf. *Argentine Republic*, *supra*.

c. Finally, if we assume (contrary to our submission) that Article 33.1 applies outside the territory of the United States and is self-executing, petitioners still would not be entitled to judicial relief. Because Section 2(c) of the Executive Order directs the Coast Guard not to return a refugee to his country of origin without his consent, there is no inconsistency between the interdiction program and the substantive nonrefoulement principle in Article 33.1. To the extent petitioners seek to change the internal procedures for implementing the Executive Order, Article 33.1 likewise furnishes them no assistance, because it does not prescribe particular procedures for the determination of refugee status, and thus mandates no particular role for administrative and judicial officials in the supervision of refugee determinations. Indeed, the U.N. High Commissioner has observed that state parties to the 1951 Convention and the 1967 Protocol "vary considerably" in their practices, including the determination of refugee status by informal, or *ad hoc*, means. See Office of the U.N. High Commissioner for Refugees, *Handbook On Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 191, at 45 (1988). Clearly, then, Article 33 provides no support for petitioners' attack on the interdiction and repatriation program.

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directly from the "parallel" obligations of the United States under Article 33.1. Similarly, the discussion in *Stevic* (467 U.S. at 429 n.22) and *Cardoza-Fonseca* (480 U.S. at 440-441), upon which petitioners also rely (Stay Applic. App. B15-B16), in fact confirms that statutory implementation was necessary to give "domestic" effect to Article 33.1.

2. Even the district court was unpersuaded by the remaining documents and statutory provisions on which the Haitian petitioners rely in seeking to establish personal rights, cognizable in U.S. courts, under the President's interdiction program. Pet. App. 42, at 52-54. The court of appeals affirmed the rejection of those claims. Pet. App. 56, at 25-30. Those rulings are correct and do not conflict with the decision of any other court, and they therefore do not warrant review here.

a. Nothing in the Executive Order suggests a purpose to create private, judicially enforceable rights. In the first place, the Order's statement that "no person who is a refugee will be returned without his consent" (see Pet. 3, 17, 28) is a mere proviso to the President's description of what the internal instructions from the Secretary of Transportation to the Coast Guard regarding the interdiction program should include—specifically, a requirement that the Coast Guard return the interdicted vessel and its passengers to the country from which it came, where there is reason to believe that an offense is being committed. § 2(c)(3). "[B]ecause a proviso can only operate within the reach of the principal provision it modifies," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, No. 90-408 (Jan. 14, 1992), slip op. 10, the proviso here is part of the internal instructions to the Coast Guard, rather than a source of personal rights on the part of individuals external to the Coast Guard's operations.

Furthermore, as the court of appeals pointed out, the Executive Order specifically contemplates interdiction

and screening on the high seas, under inherently exigent circumstances and with prompt repatriation of aliens who are found not to qualify for refugee status. Pet. App. 56, at 28. That procedure allows no time or feasible mechanism for judicial review at the behest of affected aliens. Compare *Morris* v. *Gressette*, 432 U.S. 491, 503-505 (1977). In fact, although the Executive Order is unquestionably a valid exercise of the broad Presidential authority granted by the pertinent statutory provisions, 8 U.S.C. 1182(f), 1185(a)(1), nothing in those sections evinces any congressional intent to delegate authority to create private rights of the sort ordinarily necessary for an Executive Order to have the "force and effect of law." See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304-306 (1979).

b. The foregoing principles apply with even greater force to INS's internal "Interdiction Guidelines and Operation Instructions" (see Pet. Exh. 7-9), on which petitioners also rely (Pet. 3, 25, 28). Like the Executive Order under which they were issued, the guidelines lack the "force and effect of law," because they lack a nexus to "some delegation of the requisite legislative authority by Congress." *Chrysler Corp.*, 441 U.S. at 304. As a result, the guidelines are merely internal agency directives of the sort that do not confer any enforceable rights or benefits. *Pasquini* v. *Morris*, 700 F.2d 658, 662 (11th Cir. 1983); *Dong Sik Kwon* v. *INS*, 646 F.2d 909, 918-919 (5th Cir. 1981).

c. Finally, petitioners have no rights under Sections 208 and 243(h) of the INA. As the district court pointed out, "the statutory rights and protections asserted are reserved, by the very terms of the statutes, to aliens within the United States." Pet. App. 42, at 53 (citing 8 U.S.C. 1158 (establishing asylum procedures only for aliens "physically present in the United States or at a land border or port of entry"), and 8 U.S.C. 1251 and 1253(a) (prescribing deportation procedures for aliens "in the United States")). The court of appeals agreed. Pet. App. 56, at 25-27; see also *Gracey*, 600 F. Supp. at

1404. Relief for refugees outside the United States is instead governed by Section 207 of the INA, 8 U.S.C. 1157, which commits such matters to the discretion of the President, in consultation with Congress, and to the discretion of the Attorney General, in implementing the President's decisions—without any provision for judicial review.

Petitioners point out (Stay Applic. App. B29-B30) that prior to its amendment by the Refugee Act of 1980, Section 1253(h) provided that "[t]he Attorney General is authorized to withhold deportation of any alien within the United States," but that the phrase "within the United States" was deleted and a prohibition against "return" of an alien was added in 1980. In petitioners' view, these changes suggest a congressional intent to extend the benefits of Section 1253(h) to any alien, anywhere in the world, who asserts to United States officials a fear of persecution. That remarkable result would conflict with the limitation of the deportation provisions of the Act (of which Section 1253(h) is a part) to aliens within the United States; contravene the rule against extraterritorial application of an Act of Congress in the absence of a clear statement to that effect; and lack any support in the legislative history. Further, paragraph (2)(C) of 8 U.S.C. 1253(h), also added in 1980, requires reference to the alien's conduct "prior to the arrival of the alien in the United States" in determining his eligibility for relief.

This Court has concluded that the 1980 amendments to Section 1253(h) were designed for the far more modest purpose of conforming its language to Article 33 of the Convention. *Stevic*, 467 U.S. at 421.[12] Article

[12] The term "return" in Article 33 of the Convention applies only to an alien who is already within the territory of the country (see page 11, *supra*), and there is no reason to believe that the addition of that term to 8 U.S.C. 1253(h) in 1980 had any different import. By the same token, the deletion of the phrase "within the United States" could, at most, have extended 8 U.S.C. 1253(h) to exclusion proceedings, since it was that phrase the

I(F) of the Convention confirms that Article 33 does not apply extraterritorially, because, like 8 U.S.C. 1253 (h)(2)(C), it conditions eligibility on the alien's conduct "prior to his admission" to the contracting State. Moreover, the legislative history of the Refugee Act of 1980 shows that the Convention (and thus 8 U.S.C. 1253 (h)) were understood to apply to "refugees within the territory of the contracting states." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979). This background refutes the interdictee petitioners' assertion that Congress has extended the relevant provisions of U.S. law to the high seas and foreign soil.

3. Finally, the Haitian petitioners invoke the APA to challenge the operation of the interdiction and repatriation program. Pet. 25, 26, 27; Stay Applic. App. B20-B29. As we have explained, however, none of the underlying sources on which the interdictees rely—Article 33.1 of the Convention, the Executive Order, the INS Guidelines, or the INA—affords them any substantive or procedural rights, much less rights that are cognizable in U.S. courts. The interdictees cannot overcome that fundamental defect simply by citing the APA.

Moreover, although the APA permits review of a broad range of administrative actions, it is unavailable where "statutes preclude judicial review" or "action is committed to agency discretion by law." 5 U.S.C. 701 (a). And the "presumption" of reviewability on which petitioners rely (Stay Applic. App. B23-B24) "runs aground when it encounters concerns of national security," and is inapplicable to matters affecting foreign affairs. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); *Chaney* v. *Heckler*, 718 F.2d 1174, 1195 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd, 470 U.S. 821 (1985). Against this background, the court of appeals correctly held that judicial review is foreclosed by both exceptions in 5 U.S.C. 701(a). Once again, that holding does not conflict with any decision of this Court or another court of appeals, and it presents no issue warranting review.

Court found significant in *Barber* in holding that Section 1253(h) did not apply in such proceedings. That question will not arise in the future, because the Attorney General, by regulation, has extended to aliens subject to exclusion proceedings the right to seek the relief afforded by 8 U.S.C. 1253(h). See 8 C.F.R. 236.6. In no event, however, would these textual changes give world-wide scope to Section 1253(h).

a. As the court of appeals properly recognized, the INA precludes judicial review of claims to asylum by aliens outside the United States. Pet. App. 56, at 15-19. The INA expressly creates rights of review regarding asylum and withholding of deportation claims, but only for aliens "physically present in the United States or at a land border or port of entry" (8 U.S.C. 1158(a)) or aliens "in the United States," and thus subject to the deportation provisions. See 8 U.S.C. 1105a, 1226, 1227, 1253(a). These limitations, "fairly discernible in the statutory scheme," leave no question that Congress intended to bar review at the behest of aliens beyond our borders. *Block* v. *Community Nutrition Institute*, 467 U.S. at 351 [13]; cf. *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991) (APA inapplicable to administrative procedures under INA).

As the court of appeals also noted, permitting judicial review here, notwithstanding the scheme of the INA, would conflict with a long history of decisions recognizing that Congress has never permitted judicial review of immigration decisions affecting aliens who are outside the United States and have "never presented [themselves] at the borders." *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956); see Pet. App. 56, at 17-19. This principle is reflected, for example, in the settled rule that visa decisions by U.S. consular officials are wholly unreviewable, under the APA or otherwise. See *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Pena* v. *Kissinger*, 409 F. Supp. 1182,

[13] See also *United States* v. *Fausto*, 484 U.S. 439 (1988) (provision for judicial review under Civil Service Reform Act of 1978 for certain categories of employees by implication precludes judicial review for other classes of employees).

1185-1186 (S.D.N.Y. 1976). It also is reflected in Section 207 of the Act, which commits matters concerning the admission of refugees from outside the United States to the discretion of the President and the Attorney General, without any provision for judicial review. There is no reason why Haitians on the high seas or in Cuba should have any greater right to judicial review of actions or procedures regarding their claims to refugee status and discretionary relief than those who enter the U.S. embassy in Haiti to seek relief from U.S. consular officials.[14]

b. The court of appeals also correctly held that the subject of petitioners' challenge—the processing of refugee claims of aliens outside the country—is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Where the applicable statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," APA review is precluded. *Heckler* v. *Chaney*, 470 U.S. at 830. In this case the INA furnishes no standards by which a court could assess the propriety of Coast Guard and INS actions in the interdiction program. On the contrary, Congress has granted the President broad discretion to act with regard to the exclusion of aliens "as he shall deem necessary." 8 U.S.C. 1182(f); see also 8 U.S.C. 1185(a)(1). Such provisions provide no discernible standards for judicial review. *Webster* v. *Doe*, 486 U.S. 592, 600-601 (1988).

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[14] Petitioners (Stay Applic. App. B22 n.14) and Judge Hatchett (Pet. App. 56, at 12-13) miss the point by focusing on whether aliens abroad are "persons" for purposes of the APA. The court of appeals did not rest its holding on a contrary proposition, and this case presents no occasion to consider whether aliens outside the United States may ever invoke federal court jurisdiction to bring an APA action. But see *Johnson* v. *Eisentrager*, 339 U.S. 763, 777-778 (1950). Even if we assume, *arguendo*, that such an action might lie, it is the carefully drawn scheme of the INA—which expressly affords judicial review of many immigration matters, while committing others to the sound discretion of the Executive—that bars the present action by aliens outside the United States.

Nor is there "law to apply," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), in the several documents upon which plaintiffs rely, because none purports to lay down any firm rules regarding the *procedures* by which refugee determinations must be made. The Executive Order consists merely of general instructions from the President to Members of his Cabinet regarding the implementation of a law enforcement program. The court of appeals correctly pointed out that the proviso in Section 2(c)(3) "that no person who is a refugee will be returned without his consent" says nothing about how the INS is to determine who is a refugee. Pet. App. 56, at 22. Similarly, the broad instruction to the Attorney General in Section 3 of the Order—to "take whatever steps are necessary" for the fair enforcement of the immigration laws—says nothing about what "steps" he may deem "necessary" to that end. Nor do the INS guidelines provide any standards appropriate for judicial enforcement. Although they offer—consistent with their title—internal operating *guidelines* as to some aspects of conducting interviews, they are prefaced by the recognition that the decision whether shipboard interviews are logistically possible at all must depend upon the discretionary military judgments of the commanding officer of the Coast Guard vessel in question that such activities are "safe and practicable" under the circumstances. Pet. Exh. 9. As demonstrated by the experience in this case, the commitment of pre-screening interviews to the discretion of INS is also strongly reinforced by the disruption of operations that would be caused by judicial review, and by the difficult nature of the judicial inquiry into the details of interviews that occur abroad. Cf. *Colon* v. *Carter*, 633 F.2d 964, 966-967 (1st Cir. 1980) (refusing review of the transfer of refugees to Fort Allen, Puerto Rico); *Perales* v. *Casillas*, 903 F.2d 1043, 1047-1048 (5th Cir. 1990) (declining review of INS voluntary departure determinations).[15]

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[15] Similarly, as we have explained (see pages 16-17, *supra*), Article 33.1 of the Convention—even if it applied—would prescribe no particular procedures for making refugee determniations.

It is no answer to suggest, as petitioners did below, that while the President's actions in this setting are unreviewable, those of his subordinates in carrying out his directives are not. See Pet. App. 56, at 27. That argument would destroy the President's discretion in all matters other than those that he can execute personally. Yet when the President's subordinates act in the sensitive areas of foreign affairs, border protection, and military operations at issue here, "their acts are his acts" and are equally beyond the power of a court to control. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). If a court presumed to interpret the President's orders to his subordinates, assess whether they have effectively carried out the orders, and prescribe the consequences if it believes they have not done so, it would effectively seize all the President's discretion to itself. It would thereby ignore the important fact that the President's control of his subordinates combines a complex system of written directives, oral instructions, and continual monitoring that may result in a constantly evolving pattern of action. To impose on this system a judicial process that moves with untoward slowness may prevent development of policies that can deal effectively with changing world events. Under our system of government, a court's injunctive authority is no substitute for the authority of the President to hire, direct and fire those whom he chooses to implement such policies.

c. Finally, even if judicial review under the APA is not entirely foreclosed by the exceptions in 5 U.S.C. 701(a), the APA does not excuse the courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted as part of the 1976 amendments implementing the recommendations of the Administrative Conference of the United States (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), which were designed *inter alia*, to ensure that the waiver of sovereign immunity in the APA did not allow courts to "decide issues about

foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference Committee on Judicial Review). As we have explained in our January 30, 1992, application to this Court for a stay pending appeal (at 16-18, 37-39) and in our memorandum of this date opposing petitioners' application for a stay pending certiorari, the injunctive relief repeatedly granted by the district court in this case impermissibly intruded into those very areas. If the district court instead had "pa[id] particular regard for the public consequences in employing the extraordinary remedy of injunction," *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982), it would have dismissed petitioners' action (as the court of appeals has, at last, ordered), for "[t]he separation of powers problems present here make this virtually a textbook case for refusing * * * discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985). The Court should allow that dismissal of this unprecedented suit to stand.

B. The bulk of the argument in the certiorari petition is devoted not to the contentions on behalf of the interdicted aliens, discussed above, but to the baseless contention by petitioner HRC that it has a First Amendment right to have its representatives enter a U.S. military base in a foreign country or board a U.S. military vessel on the high seas to meet with interdictees who are held in custody. See Pet. 14-17, 20-25. We have fully answered that contention in our January 30, 1992, application (at 22-37) for a stay of the injunction based on this First Amendment claim (which the Court granted), and there accordingly is no reason to repeat that entire discussion here. The court of appeals has now rejected HRC's First Amendment claim, largely for the reasons set forth in our stay application. Pet. App. 56, at 30-38.

The First Amendment ruling below is in full agreement with the only other appellate decision to have considered a similar claim—the D.C. Circuit's decision in *Ukranian-American*, which found no right of access even with respect to an alien in custody in the United States—and is fully consistent with this Court's decisions. *A fortiori*, there could be no conceivable basis for reinstating the district court's December 20, 1991, injunction barring repatriation of interdictees until HRC has exercised its supposed right of access. Only the individual interdictees (not HRC) have standing to prevent their repatriation. *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1725-1726 (1990). Significantly, HRC does not attempt to defend the proposition that it is entitled to an injunction barring repatriations on First Amendment grounds. There accordingly is no basis for the Court to grant certiorari on the First Amendment issue.

Indeed, Judge Hatchett, who was otherwise sympathetic to petitioners' claims, agreed with the majority below that HRC has no First Amendment right of access to Coast Guard cutters. Pet. App. 56, at 4 (dissenting opinion); compare *Gracey*, 809 F.2d at 800 (characterizing such a claim as "frivolous"). Because the program of interdiction, interview, and repatriation is designed to (and did for ten years) take place entirely on Coast Guard cutters—and because interdictees are now in custody at Guantanamo only as a result of the wholly unwarranted injunctions previously entered in this case—it is especially clear that HRC's First Amendment claim does not warrant review.

It bears reiteration that the individual interdictees, who are outside the United States, have no rights under the First Amendment to associate with or speak to representatives of HRC or to petition the United States Government for redress of grievances. Pet. App. 42, at 44-45 n.19; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265, 271 (1990); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904). Undeterred by this lack of reciprocal rights on the part of the persons

with whom it claims a constitutionally protected right to associate, HRC insists that the First Amendment affords it a right of access to Coast Guard cutters and Guantanamo to speak with and offer legal advice to individual interdictees. However, the interdictees likewise have no right to the assistance of counsel in connection with the screening process. The absence on the part of the interdictees to *receive* the assistance of counsel is fatal to any assertion by HRC of a constitutional right to *furnish* such assistance. Counsel cannot rely on their own asserted First Amendment rights to intrude themselves into a process in which counsel otherwise have no role, and courts cannot rely on the interests of parties external to an administrative process to impose additional requirements that neither Congress nor the agency has chosen to adopt. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978).

This conclusion is especially sound here, because the asylum pre-screening process is designed to determine, in an informal, nonadversarial setting, whether an interdictee exhibits a credible fear of persecution. The screening process is necessarily brief, designed to take place on Coast Guard cutters. As the court of appeals pointed out (Pet. App. 56, at 36-37), providing access to cutters would impose a "substantial burden" on the government. In addition, the presence of counsel would be incompatible with the informal and nonadversarial nature of the screening interview. Contrary to petitioners' contention (Pet. 12-13, 14, 15-17, 20-22) there is nothing improper—or impermissibly "content-" or "viewpoint-based"—about INS's decision to protect the informality and nonadversarial nature of its screening process in this manner, especially in the custodial setting of a military vessel or base, to which the public at large is not invited. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-326 (1985); see also *Wolff* v. *McDonnel*, 418 U.S. 539, 570 (1974) (no right to

counsel at prison disciplinary proceeding); *United States* v. *Gouveia*, 467 U.S. 180, 185 n.1 (1984).[16]

If the government must allow representatives of HRC to board a Coast Guard cutter or enter Guantanamo so they can speak with and advise interdictees held in custody there, any organization or person interested in assisting or advising interdictees would have a similar First Amendment claim. See *Ukranian-American*, 893 F.2d at 1381-1382. The fact that HRC's organizational purpose is concerned with Haitian migrants does not give it an interest distinct from any other member of the public in this regard. Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982).

Nor is HRC's position advanced by its reliance (Pet. 20, 22-24) on its status as counsel in this class action.

[16] Petitioners cite solely to the November 20, 1991 Declaration of Robert K. Wolthuis (Pet. 19 n.17) to support their extraordinary assertion that respondents have relied upon "fraudulent declarations" (Pet. 18) in this case. That declaration, along with five others, was submitted in the district court in support of the government's motion to vacate or stay the temporary restraining order issued the previous day—just hours after petitioners filed their complaint. It appears to have been cited twice on appeal, in our November 21, 1991 stay motion (in No. 91-6027, at 7) and in our December 4, 1991 stay motion (in No. 91-6060), both times for the noncontroversial proposition that the United States had initiated a multinational diplomatic effort to deal with the Haitian crisis—a proposition independently supported by the concurrent citation in both motions to the Declaration of Assistant Secretary of State Bernard W. Aronson, also filed in the district court on November 20. Moreover, as plainly revealed in the very deposition testimony cited by petitioners, there was nothing sinister about Mr. Wolthuis' acting in the capacity of Assistant Secretary of Defense for International Security Affairs on November 20, 1991, the day he was called upon to execute a declaration as the temporary head of the office. The Assistant Secretary position had been vacant since late August; Mr. Wolthuis was the Deputy Assistant Secretary of Defense for Global Affairs; and when the principal deputy, who usually served as Acting Assistant Secretary was out of the country (as he was on that day), the position is temporarily filled by one of the remaining deputies on a rotating basis. See Pet. App. 78, at 5-6.

Otherwise, an organization could circumvent wholly legitimate custodial arrangements and administrative procedures—and claim a right to alter them on a program-wide basis—through the simple expedient of filing a lawsuit. Moreover, HRC acts as counsel only with respect to the class claims in this litigation; that is something quite different from serving as counsel to each interdictee with respect to his own potential claim for asylum.

Finally, there is no merit to petitioners' legal contention (Pet. 15-17, 20-22), made for the first time in this Court, that respondents have arbitrarily denied access to HRC, while broadly permitting access to Guantanamo and even Coast Guard cutters to others.[17] As detailed in the Affidavit of John W. Cummings, Acting Assistant Commissioner of INS for Refugees, Asylum and Parole, the present policy is to permit access only to the following non-government personnel: (1) persons approved to participate in the screening process in some official capacity, such as the UNHCR; (2) members of the press, whose access does not include attendance at actual interviews; and (3) certain others, such as religious workers, who may furnish essential services to the aliens. Cummings Aff. ¶¶ 10-11 (Pet. App. 71).

Petitioners can establish no flaw in these criteria as means of regulating access. The presence of representatives of UNHCR or comparable organizations to observe and assist in the official business of the camps in no way imparts an obligation to allow private groups, such as HRC, to do the same or to enter the camps for other purposes. Similarly, providing limited access to members of

[17] As the court of appeals observed (Pet. App. 56, at 32 n.7), the district court noted that there was no allegation that the denial of access to HRC was the product of viewpoint discrimination, and petitioners' brief on appeal likewise did not claim discrimination. Moreover, although the district court observed in its December 20 order that the government had granted access to Guantanamo by the U.N. High Commissioner for Refugees (UNHCR) and the press (Pet. App. 46, at 9), that did not constitute a finding of viewpoint discrimination. Rather, it appears to have been an effort to justify the court's First Amendment-based injunction against repatriations, on the ground that it would not be intrusive.

the press—whose purpose of informing the American public about the events transpiring in the interdiction program is altogether different (and less intrusive) than the role of counsel that HRC seeks to play—is an eminently reasonable accommodation, fully consonant with First Amendment values. And in support of its assertion that the government has opened the camps to other groups, HRC cites two affidavits describing visits by a priest and by an organization called Lutheran Ministries. See Pet. 22 n.19 (citing Punancy Aff. (Pet. App. 31) and Wenski Aff. (Pet. App. 68)). The fact that such an organization was given access in no way undermines the legitimacy of the policy outlined above—even if, in one instance, it turned out that the visit went beyond religious ministry and included the sort of activities in which HRC seeks to engage. Punancy Aff. ¶¶ 1-2, 5.

In any event, as we have pointed out above (see page 4, *supra*), HRC *was* granted access to camps and cutters at Guantanamo through the visit of its team of lawyers and support staff in November 1991. HRC does not show —or even claim—that this access was inferior to that granted any comparable group. Petitioners' belated reformulation of their sweeping First Amendment claim into one of discrimination therefore manifestly does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

HAITIAN REFUGEE CENTER, INC., ET AL. *v.* JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON APPLICATION FOR STAY AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91–1292. Decided February 24, 1992

The application for stay of mandates, presented to JUSTICE KENNEDY and by him referred to the Court, is denied. The petition for a writ of certiorari is denied.

JUSTICE STEVENS, respecting the denial of certiorari.

It is important to emphasize that the denial of the petition for writ of certiorari is not a ruling on any of the unsettled and important questions of law presented in the petition. See *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (STEVENS, J., respecting denial of certiorari).

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JUSTICE THOMAS, respecting the denial of certiorari.

On January 31, 1991, I voted to deny the government's application to stay the District Court's injunctions in this case because, in my view, the petitioners deserved the additional twenty-four hours they had requested for the purpose of taking depositions and filing a response. The petitioners have since briefed the merits of their petition for certiorari, and I now conclude that under the standards this Court has traditionally employed, cf. S. Ct. Rule 10.1, the petition should be denied.

The affidavits filed throughout this litigation have sought to describe the conditions in Haiti and the treatment the returnees have received there. I am deeply concerned about these allegations. However, this matter must be addressed by the political branches, for our role is limited to questions of law. Because none of the legal issues presented in this petition provides a basis for review, I join the Court's denial of certiorari.

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JUSTICE BLACKMUN, dissenting from denial of certiorari.

The world has followed with great concern the fate of thousands of individuals who fled Haiti in the wake of that country's September 1991 military coup. As the complex procedural history of this case reveals, the legal issues surrounding the rights of Haitians interdicted on the high seas by the United States Coast Guard have deeply divided the four federal judges who have considered their claims. Each of the issues presented—whether the United States Government is violating the First Amendment by denying lawyers from the Haitian Refugee Center a right of access to the Haitians held at Guantanamo Bay; whether international or domestic law affords the Haitians a substantive right not to be returned to a country where they face possible persecution; and whether the Haitians may challenge the adequacy of procedures employed by the United States Government to identify those facing political persecution—is difficult and susceptible to competing interpretations.

A quick glance at this Court's docket reveals not only that we have room to consider these issues, but that they are at least as significant as any we have chosen to review today. If indeed the Haitians are to be returned to an uncertain future in their strife-torn homeland, that ruling should come from this Court, after full and careful consideration of the merits of their claims.

I dissent from the Court's decision to deny a writ of certiorari.